92-244

Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States
October Term, 1991

PETER R. PIEKARSKI,

Petitioner,

vs.

HOME OWNERS SAVING BANK, F.S.B., and M. GENE DONLEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Resolution Trust Corporation, under the removal provisions of FIRREA,[1] has an absolute right to remove a state court action a second time, independent of the common law and statutory limitations imposed on other litigants.

II. Whether the exercise of federal court jurisdiction under FIRREA, as applied to Piekarski's solely state law claims, violates principles of federalism and due process, when the case is removed to Minnesota federal district court after

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[1]The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub.L.No. 101-73, 103 Stat. 183 et. seq.

liability has been determined by the state trial court, is remanded to the state court, is removed again to the District Court for the District of Columbia on grounds existing at the time of the first removal, and is finally transferred back to the Minnesota federal district court (a court which had declined to transfer the case to the transferor court in the first instance, a court where the action could not "have been brought" originally, and a court that subsequently dismissed the distant parent company under federal receivership).

III. Whether collateral papers filed at the same time as an actual

notice of appeal may serve as the functional equivalent of the notice of appeal.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992
No. _____

Peter R. Piekarski,

Petitioner

vs.

Home Owners Savings Bank, F.S.B. and M. Gene Donley,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Peter R. Piekarski, the petitioner herein, prays that the writ of certiorari issue to review the judgment of the United States Court of

Appeals for the Eighth Circuit, and/or the judgment of the United States District Court for the District of Columbia.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 956 F.2d 1484 (8th Cir. 1992) and is printed in Appendix A hereto, infra, page A-1. The judgments of the United States District Court for the District of Minnesota are reported at 759 F.Supp 542 (D.Minn. 1991), 755 F.Supp 859 (D.Minn. 1991), and 752 F.Supp. 1451 (D.Minn 1990) and are printed in Appendix A hereto, infra, pages A-72, A-105 and A-146 respectively. The judgment of the United States District

Court for the District of Columbia is reported at 743 F. Supp. 38 (D.D.C. 1990) and is printed in Appendix A hereto, infra, page A-262.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on February 28, 1992. A timely petition for rehearing was denied on April 8, 1992. (Appendix A, infra, page A-315). The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. §1254(1). In addition, this Court has jurisdiction to determine whether federal jurisdiction has been improvidently exercised below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner states that 28 U.S.C. §2403(a) may be applicable.

This case involves the Fifth Amendment to the Constitution of the United States, which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This case involves the Tenth Amendment to the Constitution of the United States, which provides as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

This case involves 12 U.S.C. §1441a(l), which provides as follows:

> (l) Power to remove; jurisdiction
>
> (1) In general
>
> Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the Corporation is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit, or proceeding.

(2) Corporation as party

The Corporation shall be substituted as a party in any civil action, suit, or proceeding to which its predecessor in interest was a party with respect to institutions which are subject to the management agreement dated February 7, 1989, among the Federal Savings and Loan Insurance Corporation, the Federal Home Loan Bank Board and the Federal Deposit Insurance Corporation.

(3) Removal and remand

The Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States District Court for the District of Columbia, or if the action, suit, or proceeding arises out of the actions of the Corporation with respect to an institution for which a conservator or a receiver has been appointed, the United States district court for the district where the institution's principal business is located. The removal of any action, suit, or proceeding shall be instituted --

(A) not later than 90 days after the date the Corporation is substituted as a party, or

(B) not later than 30 days after the date suit is filed against the Corporation, if such suit is filed after August 9, 1989.

The Corporation may appeal any order of remand entered by a United States district court.

STATEMENT OF THE CASE

The Procedural Facts

This case was commenced in Hennepin County District Court, State of Minnesota. The defendants then transferred the case to Otter Tail County District Court, State of Minnesota. The state trial judge found liability on four separate grounds following a unanimous verdict from an advisory jury. The jury found all sixteen issues in favor of Piekarski including two grounds for punitive damages against individual defendant Donley. See State Trial Findings, reprinted in Appendix A, 752 F.Supp. 1451, 1458-70 (D.Minn. 1990).

After the liability determination, but before the damages portion of the

bifurcated trial, the defendants removed the action to the United States District Court for the District of Minnesota based on the federal receivership of a distant parent company, Home Owners of Boston.[2] That court, J. Devitt, remanded the case back to the state court, on plaintiff's motion, interpreting 12 U.S.C. §1441a(l) as requiring removal exclusively to the United States District Court for the District of Columbia. See Memorandum and Order, 6/12/90, pp. 2-5, reprinted in Appendix A, infra p. A-330. Judge

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[2] Home Owners-Boston is the parent company of Knutson Mortgage Company (headquartered in Minneapolis), and Knutson Mortgage Company is in turn the parent company for Home Owners-Fergus Falls.

Devitt also denied defendants' motion to transfer venue to the United States District Court for the District of Columbia because, despite the fact that the "court [had] the power to transfer under the act",[3] "[c]onsiderations of equity and judicial economy weigh[ed] against transfer." Id. at 5.

Defendants next removed the case to the United States District Court for the District of Columbia. Piekarski moved for remand, and the defendants filed a motion to transfer the case back to the United States District Court for the District of Minnesota. That court, J. Hogan, could "see no

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[3] Pursuant to either 28 U.S.C. §1631 or 28 U.S.C. §1406(a).

reason to interrupt [the] on-going state proceeding to grant the RTC the 'benefit' of a federal forum;" nor could it see any "potential for abuse by allowing the RTC to defend such an action in state court." 743 F.Supp. 38, 43, n.6 (D.D.C. (1990)). However, it denied Piekarski's motion to remand, holding that FIRREA afforded the "RTC the absolute right, to remove to federal court, subject to the time limitations imposed in the statute." Id. at 42. Judge Hogan concluded that "Congress would be wise to revisit the FIRREA removal provisions to consider whether a federal forum is necessary in every case involving the RTC (particularly those involving only issues of state law)." Id. at 44.

The court then transferred the case to the United States District Court for the District of Minnesota, in an acknowledged "exercise in legal gymnastics," pursuant to 28 U.S.C. §1404(a). Id. Fearing that an improvidently exercised transfer would, in combination with the arguments against the propriety of the second removal, deny the transferee court jurisdiction to render a judgement in his favor, Piekarski "oppos[ed] the transfer." Id. at 42. Judge Hogan phrased the "crucial question [as] whether or not the federal court in Minnesota [was] a district where this action "might have been brought." Id. He observed that "[h]ad the RTC been named as a

defendant at the commencement of the suit, the suit 'might have been brought' in Minnesota." Id. at 43. The RTC could not have been named at the commencement of the suit, however, since the parent company in Boston was not under federal receivership until well after the trial had begun. Nonetheless, Judge Hogan held that the dictates of Hoffman v. Blaski, 363 U.S. 335 (1960),[4] are limited to its particular facts and that a

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[4] In Hoffman, this Court held that the phrase "where it might have been brought" cannot be interpreted to mean "where it may now be rebrought, with defendants' consent." 363 U.S. at 342, 343. Judge Hogan held that Hoffman is properly limited by the phrase "with defendants' consent" because clearly he interpreted the phrase to include where it may now be rebrought.

retrospective impossibility satisfied the meaning of 28 U.S.C. §1404(a). Id. at 42-43.

Piekarski again contested the second removal, transfer, and exercise of jurisdiction over his purely state law claims in another motion to remand when the case was returned to the United States District Court for the District of Minnesota. That motion was denied, without a published opinion, but Piekarski prevailed in the damages portion of the trial. See 752 F.Supp. 1451 (D.Minn. 1990). Piekarski also prevailed in post-trial motions to have the state court liability determinations overturned. See 759 F.Supp. 542 (D.Minn. 1991). The court did however amend the judgment to

dismiss the only defendant under federal receivership, Home Owners-Boston. Id. at 546. At every opportunity prior to that judgment Piekarski contested the federal jurisdiction over his claims. As FIRREA only grants the RTC appellate review of motions to remand that are granted, this is Piekarski's first opportunity to appeal the exercise of jurisdiction over his claims. See 12 U.S.C. §1441(l)(3).

Home Owners-Fergus Falls appealed the district court decision by filing a Notice of Appeal on April 5, 1991. The Notice of Appeal did not name individual defendant Donley as an appellant. Although the Eighth Circuit Court of Appeals contacted

Donley's counsel well within the 30-day appeal period, and advised him of the possible insufficiency of the "et. al" designation on the Notice of Appeal, Donley nevertheless failed to appeal within that period.

Thereafter, Donley filed an Amended Notice of Appeal on May 2, 1991 and requested Judge Devitt to accept the appeal claiming excusable neglect on the part of his counsel. Judge Devitt, finding no basis for the request, denied it. See Order, 4-90-661, pp. 3-5, Appendix A, infra page A-368. However, upon entertaining the issue on the merits, the Eighth Circuit Court of Appeals held that Appellant's Information Form A, an accompanying paper which listed Donley

as a party appealing the judgment, satisfied a "functional equivalent" exception to the particularity requirement of Federal Rule of Appellate Procedure 3(c). See 956 F.2d 1484, 1486, n. 1 (8th Cir. 1992). The Court went on to reverse all findings of liability against the defendants.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted to Remedy an Improvident Exercise of Federal Court Jurisdiction.

This case, based exclusively on state law claims, was commenced on November 18, 1988. The trial was bifurcated between liability and damages with an advisory jury sitting

during the liability phase. On February 20, 1990, the state trial court issued its findings of fact, conclusions of law and order for judgment against the defendants. Reprinted in Appendix A, p.___, 752 F.Supp. 1451, 1458-70 (D.Minn 1990). On April 27, 1990, the Office of Thrift Supervision was appointed conservator for Home Owners-Boston, the parent company of Home Owners-Fergus Falls' parent company Knutson Mortgage Company.

The action was originally removed to the United States District Court for the District of Minnesota by notice of removal on May 7, 1990. Judge Devitt remanded the case to state court on June 12, 1990, because

the "defendants could only have removed to the United States District Court for the District of Columbia", and he refused to transfer it there because "equity and judicial economy weighed against transfer." Memorandum and Order, Civ. 3-90-248, Reprinted in Appendix A, p. A-330, pp. 4-5. However, on June 15, 1990, the defendants removed the action a second time to the United States District Court for the District of Columbia.

Traditionally, courts have prohibited second removals that are based either on the same grounds rejected previously, St. Paul and Chicago R. Co. v. Mclean, 108 U.S. 212, 217 (1883), or based on grounds that existed at the time of the first

removal. Pope v. Cheney, 22 F. 177, 178-179 (S.D. Iowa 1884). Implicit in those prohibitions are the strict conditions under which a defendant may seek a second removal under 28 U.S.C. §1446(b) and the common law doctrine codified therein. See Fritzlen v. Boatsmen's Bank, 212 U.S. 364, 372 (1909); Powers v. Chesapeake & Ohio Ry., 169 U.S. 92 (1898). "These cases [and Section 1446(b)] stand for the proposition that a defendant who fails in an attempt to remove on the initial pleadings can file a removal petition when subsequent pleadings or events reveal a new and different ground for removal." Federal Deposit Ins. Corp. v. Santiago Plaza, 598 F.2d 634, 636 (1st Cir. 1979) (emphasis in original)

Case law uniformly holds that where the grounds relied upon for a second removal existed at the time of the first removal, the defendants are foreclosed from asserting such a basis for removal. See The Texas Plumbing Company v. Zurn Industries, Inc., 168 F.Supp. 144, 145 (N.D.Tex. 1958); see also Kulbeth v. Woolnought, 324 F.Supp. 908, 911 (S.D.Tex. 1971). Prior to FIRREA, courts also gave effect to those requirements when interpreting removals by federal banking agencies. See Santiago Plaza, 598 F.2d 634, 636 (1st Cir. 1979). The only circuit court to discuss the issue after the passage of FIRREA was cautious of the prohibitions against second removals. Kirkbride v.

Continental Cas. Co., 933 F.2d 729, 732 (9th Cir. 1991) (Santiago satisfied because "subsequent pleadings or events revealed a new and different ground for removal.").

In the present case, the United States District Court for the District of Columbia erroneously rejected the second removal limitation. It noted that "FIRREA does not prohibit a party from correcting the defective removal attempted to a court," and thereby reasoned that it affords the "RTC the absolute right to remove to federal court, subject to the time limitations imposed in the statute." 743 F.Supp. 38, 41-42 (D.D.C. 1990). By allowing the second removal of this action under the "absolute right" rationale,

the court (1) ignored the common law prohibition against second removals; (2) abrogated the purpose of the time period allowed for removal; and (3) failed to recognize that the general statutory procedure provisions supplement FIRREA, especially on issues where FIRREA is silent.

Although FIRREA does not prohibit second removals, the common law prohibits a second attempt at removal that is not "new and different." See Santiago, 598 F.2d 634, 636 (1st Cir. 1979) (citing the common law origins); see also Kirkbride, 933 F.2d at 732 (9th Cir. 1991) (FDIC petition did not violate any common law prohibition against successive removals). A procedural avenue to another federal

district court can only be "new" if it didn't exist at the time of the first removal. Thus, since all statutory bases for removal existed from the outset of the RTC's appointment as receiver for Home Owners-Boston, a second attempt at removal is prohibited. The rule properly places the risks and uncertainties surrounding the interpretation of the provisions on the party choosing to invoke its protections-the RTC. In addition, litigants lacking the federally funded muscle of the RTC may, in good faith, challenge a removal without the chilling possibility of a second attempt, and perhaps a return to the same

venue.[5]

Allowing the RTC to remove this action a second time resulted in an abrogation of the purpose of the FIRREA time provision. Using the 90 day time limit[6] to facilitate second

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[5] See Bank/Thrift Litigation and Enforcement News, RTC Solves Its Removal Problem -- Maybe & Sort Of, Vol. 2, No. 22, p. 1, 4 (discussing this case and concluding that "counsel thinking of opposing the government's removal motions" will be forced to consider that "their cases will end up in federal court anyway, in their local district or even in Washington.").

[6] 12 U.S.C. §1441a(l)(3) provides in relevant part:

The removal of any action, suit, or proceeding shall be instituted -- (a) Not later than 90 days after the date the Corporation is substituted as a party, or (b) Not later than 30 days after the date suit is filed against the Corporation, if such suit is filed after August 9, 1989.

removals runs counter to the purpose of that provision. The extended removal period is meant to allow the RTC to familiarize itself with the litigation prior to removal, not to test the removal waters. The legislative history reflects that the ability of the FDIC to stay proceedings for 45 days upon its appointment as conservator or receiver for the failed institution provides the same rationale as the extension of the RTC removal time. "The appointment of a conservator or receiver can often change the character of the litigation; the stay gives the FDIC a chance to analyze pending matters and decide how best to

proceed."[7] Plainly, the purpose of the extra period is to allow the RTC time to determine "how best to proceed".

When the RTC first exercises the right of removal that purpose is fully satisfied. A second removal outside of the 30 days normally allowed[8] simply facilitates the abuse of the provision. The law against second removals is designed to curb such abuse. Ignoring such considerations enables parties to use removal "as a means of delay and protracting litigation to the manifest injury of

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[7] H.R. Rep. No. 54(I), 101st Cong., 1st Sess. 331 (1989), reprinted in 1989 U.S. Code Cong. and Admin. News (103 Stat. 86, 127).

[8] 12 U.S.C. §1441a(l)(3)(b).

the other parties in interest." Pope v. Cheney, 22 F. 177, (S.D. Iowa. 1884).

Most importantly, the United States District Court for the District of Columbia's refusal to apply the prohibitions against second removals to FIRREA, absent such a directive in FIRREA itself, ignores what other courts have nearly universally accepted -- that general federal statutory procedure provisions must supplement FIRREA, especially and necessarily where that statute is silent. The RTC removal provisions cannot be wholly independent from the general provisions because it is impractical to expect every statute that changes some removal provisions

to address all of the exhaustive considerations.

Courts have concluded that there would be no reason to enumerate the specific changes if Congress meant for FIRREA to be completely independent of the general removal provisions. See Resolution Trust Corporation v. Lightfoot, 938 F.2d 65, 68 (7th Cir. 1991); see also Woburn Five Cents Sav. Bank v. Robert M. Hicks, Inc., 930 F.2d 965, 968 (1st Cir. 1991) (applying the same reasoning to interpret the FDIC removal procedures with guidance from the general removal statute). Lightfoot represents the prevailing view that the FIRREA provisions supplement the general statutory procedural provisions, not

supplant them. 938 F.2d 65, 68 (7th Cir. 1991).[9] Even a court that prescribed to Judge Hogan's "absolute

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[9] Note that under Lightfoot the defendants would have been successful in their first effort to remove this case to the United States District Court for the District of Minnesota pursuant to 28 U.S.C. §1441(a). However, that does not vitiate the fact that the second removal was improper.

Moreover, at the time of the first removal the district courts were denying the RTC use of 28 U.S.C. §1441(a). See Federal Sav. and Loan Ins. v. Westgate Partners, 726 F.Supp. 807, 809 (D.Colo. 1989). Since this was the first case in which the RTC attempted a second removal to the District Court for the District of Columbia, Piekarski could not have anticipated the procedural nightmare to follow. See Bank/Thrift Litigation and Enforcement News, RTC Solves Its Removal Problem -- Maybe & Sort Of, Vol. 2, No. 22, p. 1,4 (not until after this case would "counsel thinking of opposing the government's removal motions" . . . consider that "their cases will end up in federal court anyway, in their local district or even in Washington".).

right to remove" recognized that the general procedural provisions supplement FIRREA and implicitly acknowledged that a second removal to the District Court for the District of Columbia would be an improvident exercise of jurisdiction under 28 U.S.C. §1446. See Sweeney v. Resolution Trust Corp., 765 F.Supp. 33, 35 (D.Mass. 1991).[10]

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[10] In Sweeney, the court dismissed plaintiff's motion to remand as untimely under 28 U.S.C. §1447(c). Moreover, the court implicitly recognized that a subsequent removal to the District Court for the District of Columbia, if remand were granted, should be unsuccessful. Id. If not, the plaintiff could simply anticipate being cast out to the District of Columbia, only to be reeled in under 28 U.S.C. §1404(a). If the Sweeney court thought that that was a likely scenario then plaintiffs' untimely motion to remand should have been characterized as wise rather than untimely.

Where a second removal fails to present new and different grounds as required by 28 U.S.C. §1446(b), Congress has directed that such actions be remanded to the state courts. See O'Bryan v. Chandler, 496 F.2d 403, 409 (10th Cir. 1974)("there must be both an amended pleading or paper and a ground for asserting removability that exists for the first time.") As such, Congress has effectively declined jurisdiction to the federal courts where defendants fail to satisfy that mandate.

This case has cast the FIRREA removal issue into waters that have

spawned absurd consequences.[11] In order to mitigate the absurd outcomes, the United States District Court for the District of Columbia developed a transfer remedy. Under the general transfer provision, courts may transfer cases to "any other district or division where it might have been brought" for the convenience of the parties. 28 U.S.C. §1404(a). The District Court for the District of Columbia broadly construed that provision, allowing transfer of this case back to the District Court for

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[11] See Josel, The Resolution Trust Corporation: Waste Management and the S & L Crisis, 59 Fordham L. Rev. S339, n. 179 (1991)(summarizing other cases of purely state law origins that have matriculated through the United States District Court for the District of Columbia).

the District of Minnesota which (as interpreted) was instructed to decline jurisdiction in the first instance. While remedying the immediate inconvenience, the transfer created an anomalistic result which admittingly was "an exercise in legal gymnastics." 743 F.Supp. 38, 44 (D.D.C. 1990).

Moreover, that result will likely discourage litigants from contesting an RTC removal to a federal court in the state where the action was pending. See Bank/Thrift Litigation and Enforcement News, RTC Solves Its Removal Problem-- Maybe & Sort Of, Vol. 2, No. 22, p. 1, 4. Contesting the removal allows the RTC to flex its federally-funded muscles, often at the expense of other litigants. This

Court has noted that such a "vicious circle of litigation" is disfavored. Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 816 (1988).

That vicious circle of litigation is broken if the abuses regarding second removals are curbed. The common law and statutory doctrines restricting second removals prohibit the accommodation made to the defendants, allowing them to remove this action a second time. Permitting second removals promises to give the RTC carte blanche to abuse the removal process to the prejudice of other litigants. This Court should grant Certiorari to determine whether the second removal and transfer of

this action was improvidently taken so as to deny the federal courts jurisdiction to render judgment in this case, or whether the RTC has in fact an "absolute right to remove," immune from the statutory and common law limitations imposed on other litigants.

II.

Certiorari Should Be Granted to Remedy an Unconstitutional Exercise of Federal Court Jurisdiction.

Commentators have already speculated that the procedural history of this case raises due process concerns.[12] Moreover, other courts have stated

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[12] See Josel, The Resolution Trust Corporation: Waste Management and the S & L Crisis, 59 Fordham L. Rev. S339 (1991); see also Grafman, A New S & L Venue Game, Nat'l L.J., Jan. 14, 1991, at 13, 14.

"reservations about remanding a matter involving only state law issues that will probably be removed to the District of Columbia, only to be transferred back to this Court after one of the parties files a motion to transfer," but "[s]till, the Court sees no other way to interpret Congressional intent with regard to FIRREA's removal provision." Hellon & Assocs. Inc v. Phoenix Resort Corp., 755 F.Supp. 280, 284 (D.Ariz. 1990). The issue is now ripe for a determination of whether that "Congressional intent", if any, can be applied to the facts and circumstances of this case and still pass constitutional muster.

At first blush, this case appears best pigeonholed in notions of comity and federalism through application of the abstention doctrine which has grown up around those interests. See Younger v. Harris, 401 U.S. 37, 44-45 (1971). Clearly such a discretion would have been exercised in this case because Judge Hogan stated that he could "see no reason to interrupt an on-going state proceeding," . . . nor "potential for abuse by allowing the RTC to defend such an action in state court." 743 F.Supp. 38, 43, n.6 (D.D.C. 1990). However, since this Court's decision in Thermtron Products v. Hermansdorfer, courts have been prohibited from remanding cases properly removed for discretionary

reasons not authorized by the controlling statute. 423 U.S. 336, 345, n.9. (1976). Thermtron was not an extraordinary result on its facts,[13] but nonetheless, the District Court for the District of Columbia used that rule to foreclose any equitable considerations in the remand decision. 743 F.Supp. 38, 42 (D.D.C. 1990).

This Court has noted that a change in forum is a procedural consideration. Hallowell v. Commons, 239 U.S. 506 (1916); see also Griffon v. United States Dept. of Health and Human Services, 802 F.2d 146, 152 (5th

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[13] In Thermtron, the district court remanded the case solely because the judge faced an over-crowded docket. 423 U.S. 336, 339 (1976).

Cir. 1986). However, in order to withstand scrutiny under the Fifth Amendment's due process clause a statute must have a legislative purpose, applied in a manner that is neither harsh nor oppressive. Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 733 (1984). The removal provisions in FIRREA did not simply work a change in forum in this case, but rather snatched Piekarski's state court liability victory out of the state courts into such a federal procedural quagmire that due process mandates that a discernable purpose justify that result. Courts have struggled to discern the possible congressional intent behind the FIRREA removal

provisions, or at least have sought a common sense harmony between FIRREA and removal actions generally. See Resolution Trust Corporation v. Westgate Partners, Ltd., 937 F.2d 526, 531 (10th Cir. 1991). However, in this case there is simply no rational basis for applying the FIRREA removal provisions. The fact that some courts have sought to solve the problem by extending the general removal provision to the RTC does not vitiate the unconstitutional application of the FIRREA provision to this case.[14]

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[14] The Seventh Circuit has held that 28 U.S.C. §1441(a) is available to the RTC absent explicit language to the contrary. See Resolution Trust Corporation v. Lightfoot, 938 F.2d 65, 67, 68 (7th Cir. 1991).

Although some areas of FIRREA are characterized by "voluminous"[15] legislative history, the FIRREA removal provisions are afforded only a repetition of the language itself.[16] That lack of apparent thought is consistent with what a commentator has dubbed as the "S & L hopscotch" and concluded that "[i]ntentionally or not, FIRREA legislation can create a highly eccentric Rube Goldberg cartoon version of due process." Grafman, A New S&L Venue Game, Nat'l L.J., Jan. 14, 1991, at 13, 14. In fact, a

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[15] See Mountain Ridge State Bank v. Investor Funding, 763 F.Supp. 1282, 1289 (D.N.J. 1991).

[16] See H.Rep.No. 54(I), 101st Cong., 1st Sess. 362 (1989), U.S. Code Cong. & Admin.News 1989, pp. 86, 158.

Congressional intent or purpose, even if possible to discern, has been virtually abandoned in the judicial construction of the provision.[17] "One thing, though, is crystal clear. This newly evolving game of legal hopscotch makes no sense." Id.

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[17] For example, in Westgate, the RTC had removed the action to its institution's principle place of business and argued that it could do so under the provisions of FIRREA. 937 F.2d 526 (10th Cir. 1991). The Court rejected that argument under the statute's plain meaning. Id. at 529. More importantly for present purposes, the court commented that it is unnecessary to discern a logical congressional intent from the FIRREA removal provision, concluding that "so long as Congress remains faithful to the Constitution, it is free to enact any number of foolish statutes." Id.

While statutory construction may not mandate a discernable purpose, due process does.

A statute will withstand scrutiny under the due process clause of the Fifth Amendment if Congress enacts it pursuant to a rational legislative purpose, in a manner that is neither harsh nor oppressive. Pension Benefit Guaranty Corp. v. R. A. Gray & Co., 467 U.S. 717, 733 (1984). Assuming the FIRREA removal provisions have a discernible purpose, the application of those provisions to the present case was sufficiently offensive to raise due process concerns. In this case, the removal of solely state law claims after a state court determination of liability, followed by another removal after the first attempt failed, was based solely on the federal receivership of a distant

parent company that was never involved substantively in the case.

In addition to requiring a legitimate purpose and rational application of the FIRREA removal provisions to the present action, due process dictates that retroactive application of new procedural provisions must afford the burdened party a "substantial and efficient remedy." Crane v. Hahlo, 258 U.S. 142, 147 (1922). This constitutional protection is appropriate to the facts of this case because much of the inefficiency is a product of the retroactive application of FIRREA. Courts have held that the jurisdictional provisions of FIRREA must be applied retroactively, as in

the present case, to cases filed before the passage of FIRREA. See Triland Holdings & Co. v. Sunbelt Service. Corp., 884 F.2d 205, 206-07 (5th Cir. 1989). However, that fact does not absolve the constitutional limitations imposed by due process, but rather should heighten the inquiry.

The only case to address the issue has rejected the due process challenge based on a lack of compelling procedural hardship. See Sunbelt Savings v. Bent Trail Phase IV Joint Venture, 907 F.2d 1569, 1571 (5th Cir. 1990) (substantial and efficient remedy provided by FIRREA). By contrast, this case has been the ultimate RTC "guinea pig", see supra

note 9 and accompanying text, and its procedural history has left an actual "bent trail" from the state trial court to the federal district court in Minnesota, back to the state trial court, across the country to the federal district court in Washington, D.C., and then back again to the federal district court in Minnesota. Moreover, the damages portion of the trial required the repetition of a substantial amount of evidence, 759 F.Supp. 542, 545 (D.Minn. 1991) (damages portion of trial requiring Judge Devitt to become "relatively familiar with that portion of the liability record pertaining to plaintiff's retaliatory discharge claim"), and defendants post-trial

motions effectively forced the plaintiff to fund a response to an attempted "microscopic reexamination of the entire liability record." Id. As such, the retroactive application of the FIRREA removal powers to this case offends the "efficiency" guarantee embodied in due process. See Crane v. Hahlo, 258 U.S. 142, 147 (1922).

The next constitutional hurdle that the FIRREA removal provisions must clear is the limitation embodied in federalism. One federal district court has suggested that removal of a state court decision to a federal district court runs contrary to the nature of our federalist system. Federal Deposit Ins. Corp. v.

Sellards, 731 F.Supp. 1300, 1301-04 (N.D.Tex. 1990).[18] Another federal district court has granted a motion to remand based on "consideration to the values of federalism and comity, as embodied in the Full Faith and Credit Act, 28 U.S.C. §1738." Federal Sav. & Loan Ins. Corp. v. Templeton, 700 F.Supp. 456, 457-58 (S.D.Ind. 1988). In this case the only federal interest was a receivership interest over a distant parent company that was ultimately dismissed from the

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[18] The court had another means of disposing of the removal issue and thus avoided the constitutional issue. Id. at 1304.

lawsuit.[19]

The federalism concern in this context arises in part from the fact that lower federal courts possess no power to sit in direct review of state court decisions. See Atlantic Coast Line Ry. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 296 (1970). In fact, Judge Devitt was concerned that his review of the state court liability determinations in this

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[19] The power to remove is evaluated at the time of removal, and the dismissal of one of the parties by the time of appeal does not normally affect the propriety of removal. See Federal Sav. & Loan Ins. Corp. v. Griffin, 935 F.2d 691, 695 (5th Cir. 1991). However, in this case it wasn't the dismissal of the federal interest in the case, but rather its remoteness that heightens the federalism concerns.

case raised such an issue. 759 F.Supp 542, 545 (D.Minn. 1991) ("this court does not occupy an appellate rank vis-a-vis the state district court"). Under the reasoning of this Court in Atlantic Coast Line, if a federal interest is sufficiently affected by a state trial court liability determination it may seek vindication of that right in the state "appellate courts and ultimately, if necessary, in this Court." 398 U.S. at 296.

Judge Devitt entertained defendants post-trial motions pursuant to Federal Rule of Civil Procedure 60(b). 759 F.Supp. 542, 543 (D.Minn. 1991). The Fifth Circuit has said that "a state court judgment in a case properly removed can be vacated under Rule

60(b)." Northshore Development, Inc. v. Lee, 835 F.2d 580, 583 (5th Cir. 1988). The Sellards court criticized that blanket statement because the authority for making it was based on cases seeking relief from default judgments. 731 F.Supp. at 1303-04, n.9.[20] Since Piekarski prevailed on those post-trial motions the federalism interest appears less offended. However, even if such an after the fact analysis were proper, the limitations embodied in Atlantic Coast Line extend beyond the initial

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[20] The court reasoned that a "default judgment is a far cry, however, from a state court judgment reached by the state judge after consideration by that judge of the parties' appearances, pleadings, motions and oral argument." Id.

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offensive act to appellate review. 398 U.S. at 296.

In sum, this Court should grant Certiorari to determine whether the retroactive application of the FIRREA removal provisions to this action (1) was pursuant to a rational Congressional purpose and applied in an inoffensive manner as required by due process; and/or (2) provided a substantial and efficient remedy as required by due process; and/or (3) can be reconciled with concerns of federalism.

III.

Certiorari Should Be Granted to Resolve a Conflict Between Circuit Courts.

Federal Rule of Appellate Procedure 3(c) requires that a notice of appeal "shall specify the party or parties

NOTE:

INATION IS NOT CONTINUOUS.

taking the appeal." A notice of appeal which designates a party by only "et al." is defective as to that party. Torres v. Oakland Scavenger Co., 487 U.S. 312, 317-18 (1988). However, the circuit courts disagree as to whether a collateral paper cures a defective notice.

The dispute is sparked by language in Torres which has given rise to a "functional equivalency" exception. This Court stated that "if a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires."

Id. at 316-17. The Eighth Circuit, both in the present case and in another, has extended this exception to the circumstance where the collateral paper is filed at the same time as the notice of appeal. 956 F.2d 1484, 1486 (8th Cir. 1992) (citing Good Samaritan Hosp. v. Sullivan, 952 F.2d 1017, 1021-23 (8th Cir. 1991)).

In contrast, the Seventh Circuit has stated that the above cited language in Torres "insofar as it pertains to Rule 3(c), is designed for the case where the litigant fails to file a notice of appeal, but files another paper that is its functional equivalent. It is not designed for the case--this case and Torres--where the litigant has filed a notice of

appeal and failed to name all the appellants." Allen Archery, Inc. v. Precision Shooting Equip., 857 F.2d 1176, 1177 (7th Cir. 1988). Thus, the Seventh Circuit holds that the "appellant must be named in the notice of appeal; naming him in the caption, or in collateral documents . . . will not do." Id.[21]

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[21] It is with this blanket prohibition with which other circuit courts have disagreed with the Seventh Circuit. However, the disagreement has primarily focused on whether listing a party in the caption of the notice itself is sufficient, not whether collateral documents are sufficient when an actual notice of appeal is present. See Minority Employees v. Tenn. Dept. of Emp. Sec., 901 F.2d 1327, 1335 (6th Cir. 1990) (corporate plaintiff stated in the caption of the notice is properly before the court); see also Mariani-Giron v. Acevedo Ruiz, 877 F.2d 1114, 1116 (1st Cir. 1989)(caption should be viewed as part

The Eighth Circuit in Good Samaritan explicitly rejected the approach in Allen Archery. Good Samaritan, 952 F.2d at 1022, n. 5.[22] The primary authority cited for the Eighth Circuit approach is Dura Systems, Inc. v. Rothbury Inv., Ltd., 886 F.2d 551, 555 (3d. Cir. 1989),

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of the entire notice). In fact, the Seventh Circuit has retracted its position with regard to the caption. See Hartford Casualty Ins. Co. v. Borg-Wasner Corp., 913 F.2d 419, 423 (7th Cir. 1990).

[22] The circuit court below simply adopted the holding in Good Samaritan as its own, 956 F.2d 1484, 1486, n.1 (8th Cir. 1992), and therefore it is the analysis supporting that decision that is at issue in this case. Moreover, it was a decision that was filed after oral arguments were heard in the present case, and therefore its applicability and reasoning was never briefed by the parties.

cert. denied, 493 U.S. 1046 (1990), which held that a consent order could serve as the functional equivalent of a notice when filed within the time for appeal. The court in Good Samaritan stated that "[w]hile this is a case of first impression in this circuit, we agree with other circuits which have held that additional documents filed within the statutory period for notices of appeal are the functional equivalent of a notice of appeal and, therefore, serve as a notice of appeal." 952 F.2d at 1022. The Eighth Circuit has held in this case and Good Samaritan that collateral papers filed at the same time as an actual notice of

appeal can serve as the functional equivalent of the notice.

Therefore, this case heightens the concern expressed in Allen Archery that the functional equivalency language in Torres is "designed for the case where the litigant fails to file a notice of appeal, but files another paper that is its functional equivalent." 857 F.2d at 1177; see also Pride v. Venango River Corp., 916 F.2d 1250, 1251-53 (7th cir. 1990), cert. denied 111 S.Ct. 1696 (rejecting the functional equivalency exception where an actual notice of appeal is filed). While a Consent Order granted by the appellate court itself may serve as the functional equivalent of an actual notice of appeal, Dura

Systems Inc., 886 F.2d at 554-55, a collateral paper filed at the same time as an actual defective notice of appeal creates ambiguity. The Court of Appeals below stated that the collateral document "unambiguously listed Donley as a party appealing the final judgment." 956 F.2d at 1486, n.1. However, Donley's absence was just as "unambiguous" from the notice of appeal itself. Therefore, whatever application the functional equivalency exception has to later functionally equivalent papers received within the time period of appeal (which can be viewed as a separate invocation of the court's jurisdiction), it has no application in this case. See Minority Employees v. Tenn. Dept. of

Emp. Sec., 901 F.2d 1327, 1336 (6th Cir. 1990)(any ambiguity or inconsistency will defeat the functional equivalency exception).

In this case the court clerk advised the defendants of the possible deficiency well within the time for appeal. Nonetheless, individual defendant Donley failed to correct the defect within that time period. See Affidavit of Lawrence P. Schaefer (Appendix A, infra, page 295). Given the extraordinary lengths to which the defendants went in attempting to exercise federal court jurisidiction, it is most appropriate that this court "insist on punctilious, literal, and exact compliance with the requirement in Rule 3(c) that the notice of appeal

(or its functional equivalent, if but only if no notice of appeal is filed) 'shall specify the party or parties taking the appeal'." Allen Archery, 857 F.2d at 1177.

In sum, the circuit courts disagree as to whether a collateral paper can serve as the functional equivalent of a notice of appeal when an actual notice of appeal, defective as to one of the parties, is simultaneously filed. Piekarski deserves review of this issue to settle this important dispute, and to correct the erroneous exercise of jurisdiction over individual defendant Donley.

CONCLUSION

Wherefore, petitioner respectfully

prays that a writ of certiorari be granted.

Respectfully submitted,

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92-244 (5)

Supreme Court, U.S.
FILED
JUL 6 1992
OFFICE OF THE CLERK

No. _____

In the
Supreme Court of the United States
October Term, 1991

PETER R. PIEKARSKI,

Petitioner,

vs.

HOME OWNERS SAVING BANK, F.S.B.,
and M. GENE DONLEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Peter R. PIEKARSKI, Plaintiff-Appellee,

v.

HOME OWNERS SAVINGS BANK, F.S.B., formerly known as Western Minnesota Federal Savings and Loan Association, formerly known as Western Minnesota Savings and Loan Association, formerly known as Fergus Falls Savings and Loan Association, Defendant-Appellant,

Knutson Mortgage Corporation, a Delaware Corporation; Home Owners Federal Savings and Loan Association, a federally chartered savings and loan association; Resolution Trust Corporation, Defendants,

M. Gene Donley, Defendant-Appellant

No. 91-2132

United States Court of Appeals,

Eighth Circuit.

Submitted Dec. 12, 1991

Decided Feb. 28, 1992

Discharged bank employee brought action against bank and its president in Minnesota state court alleging retaliatory discharge and breach of employment contract. Following liability phase of trial, Resolution Trust Corporation became conservator of bank's parent corporation and removed case to federal court. The United States District Court for the District of Minnesota, Edward J. Devitt, J., rendered judgment for employee, 752 F.Supp. 1451, and bank and its president appealed. The Court of Appeals, Magill, Circuit Judge, held that bank employee had no claim

for breach of employment contract, retaliatory discharge, fraudulent misrepresentation or tortious interference with contract.

Reversed.

1. Federal Courts * 666

Court of Appeals had jurisdiction over bank president's appeal, even though bank president was listed as "et al." rather than by name on notice of appeal, where bank president was listed be name on document entitled "Appellant's Information Form A" which was attached to notice of appeal; "Appellant's Information Form A" served as functional equivalent of notice of appeal. F.R.A.P.Rule 3(c), 28 U.S.C.A

2. Master and Servant * 20

Generally, under Minnesota law employer may terminate at any time and without good cause relationship with employee who was fired for indefinite term, has no written employment contract and can leave employer whenever he pleases.

3. Federal Court * 616

Employer's failure to plead or raise at trial issue of whether federal regulation preempted state contract law precluded employer from raising that issue on appeal.

4. Master and Servant * 4

Under Minnesota law, employer creates implied employment contract of unspecified duration and with discharge limited to good cause if it

communicates to employee a definite offer of "for cause" employment and employee accepts offer and furnishes consideration by retaining employment when free to leave.

5. Banks and Banking * 51

Bank employee produced no evidence that he was recipient of definite offer of "for cause" employment, as was required to maintain claim for breach of employment contract under Minnesota law.

6. Banks and Banking * 51

Job security representations made to bank employee by bank did not constitute definite offers of "for cause" employment as was required to maintain action for breach of employment contract under Minnesota

law.

7. Banks and Banking * 51

Bank by-law stating that if bank officer is removed without cause, officer's contract rights are not prejudiced did not give officer, under Minnesota law, contractual right to be fired only for cause and after notice.

8. Banks and Banking * 51

Bank employee's successful completion of probationary period of employment did not constitute definite offer of "for cause" employment, as was required to maintain action for breach of employment contract under Minnesota law.

9. Banks and Banking * 51

Bank's statements to mortgage company indicating that all bank officers

would continue in their same capacities after mortgage company acquired bank were legally insufficient to form a "for cause" employment contract with regard to officers, as was required to maintain action for breach of employment contract under Minnesota law.

10. Master and Servant * 40(3)

If employee alleging breach of employment contract never produces any evidence that off of "for cause" employment was made, not even his own testimony, he cannot prove existence of "for cause" contract solely through circumstantial evidence.

11. Master and Servant * 40(4)

Bank employee who failed to substantiate his allegations that

employer required him to commit perjury at trial, avoid subpoena or violate Federal Housing Authority regulations could not maintain claim for retaliatory discharge under Minnesota law. M.S.A ¶ 181.932, subd. 1(c).

12. Master and Servant * 40(4)

In order to maintain action for retaliatory discharge under Minnesota law, employee had to show that employer actually wanted employee to violate statutes or regulations, and issue of whether employee had good faith belief that employer wanted him to take such actions was irrelevant. M.S.A. ¶ 181.932, subd. 1(c).

13. Master and Servant * 35

Under Minnesota law, no separate

common-law actions for retaliatory wage discrimination or retaliatory discharge existed after Legislature enacted statute prohibiting to retaliatory wage discrimination and retaliatory discharge. M.S.A. ¶ 181.932, subd. 1(c).

14. Master and Servant * 35

Minnesota recognized common-law action for retaliatory wage discrimination occurring prior to enactment of statute prohibiting retaliatory wage discrimination. M.S.A. ¶ 181.932, subd. 1(c).

15. Fraud * 3

Under Minnesota law, successful claim of fraudulent misrepresentation requires proof of false representation of past or present material fact that

is susceptible to knowledge; that representor knew fact was false or asserted it as her own knowledge without knowing whether it was true or false; that representor intended that plaintiff act on statement; that plaintiff, in fact, acted in justifiable reliance on statement; that plaintiff suffered damage; and that statement was proximate cause of that damage.

16. Banks and Banking * 100

Trial court was clearly erroneous in finding that bank was liable to discharge employee for misrepresentation under Minnesota law, given absence of evidence of justifiable reliance by employee on any false representations by bank.

17. Fraud * 17

Employer's failure to tell employee that he was recording complaints in employee's personnel file could not give rise to liability on part of employer for fraudulent misrepresentation under Minnesota law, inasmuch as employer had no duty to disclose to employee that he had placed items in his file.

18. Fraud * 17

Failure to disclose material fact can constitute misrepresentation under Minnesota law only if defendant has duty to disclose.

19. Torts * 12

Discharged bank employee who failed to prove that bank president acted

maliciously when he fired him due to personality conflict between employee and president could not maintain action against president under Minnesota law for tortiously interfering with his contractual relationship with bank.

Charles A. Mays, Minneapolis, Minn., argued, for defendant-appellant.

William P. Luther, Minneapolis, Minn., argued, for plaintiff-appellee.

Before JOHN R. GIBSON, Circuit Judge, FRIEDMAN,* Senior Circuit Judge, and MAGILL, Circuit Judge.

MAGILL, Circuit Judge.

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* THE HONORABLE DANIEL M. FRIEDMAN, Senior United States Circuit Judge for the Federal Circuit, sitting by designation.

[1] Home Owners Savings Bank (Home Owners) and its president, M. Gene Donley, appeal from the trial court's judgment in favor of Peter Piekarski on claims relating to Piekarski's discharge from his employment at Home Owners.[1]

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[1] Piekarski challenges Donley's appeal on the basis that he did not file a notice of appeal within 30 days of judgment. *See* Fed.R.App.P. 3(c). Specifically, Piekarski argues that although Home Owners and Donley filed a Notice of Appeal within 30 days, it was ineffective as to Donley because it listed him as "et al." rather than by name. *See, e.g., Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318, 108 S.Ct. 2405, 2409, 101 L.Ed.2d 285 (1988). We reject this argument because attached to this notice of Appeal was Appellant's Information Form A, which unambiguously listed Donley as a party appealing the final judgment. The Eighth Circuit has recently ruled that when a collateral document naming the specific parties is filed within the required time, the document serves as the "functional equivalent" of a notice of appeal,

Specifically, both Home Owners and Donley were found liable for retaliatory discharge and breach of an employment contract. The trial court also found Donley liable for misrepresentation and tortious interference with contract. Additionally, the court imposed punitive damages on Donley. Home Owners and Donley challenge these findings, primarily on sufficiency of the evidence. We reverse all findings of liability.

I.

Because the factual history of this case is extensive, we will discuss the specific details of the

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and jurisdiction over the parties exists. *See Good Samaritan Hosp. v. Sullivan*, 952 F.2d 1017, 1021-23 (8th Cir. 1991).

dispute only as they relate to each of Piekarski's many claims. Initially, we will provide a more general background. Piekarski began his employment at Home Owners in 1973 as a mortgage lending officer. Charles Peterson, then president of Home Owners, hired Piekarski. From the beginning of his employment, Piekarski performed many of his job functions very well. Over the years, Piekarski's responsibilities and salary increased, and in 1981, Piekarski was promoted to vice president of mortgage lending.

Despite Piekarski's ability in some areas, problems between Piekarski and his supervisors existed. Three to four years after Peterson hired

Piekarski, Peterson became sufficiently disturbed by Piekarski's criticism of management that he requested Donley to act as a buffer between them. Tr. at 682-83. Piekarski's 1978 and 1979 annual written reviews criticized Piekarski for supporting employees rather than management. Pl.'s Ex. 31, 32. Piekarski's 1981 review contained written criticisms of his cooperation with management.[2] Pl.'s Ex. 33. When Donley took charge of the officer personnel files in 1982, he began to record specific instances of misconduct. Tr. at 486-87. Problems consistently noted were tardiness and failure to respond adequately to

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[2] There was not a 1980 written review.

supervisors' requests. *See* Pl.'s Ex. 34-47, 50. For instance, tellers complained that, contrary to a management policy requiring officers assigned to evening supervision to stay near the tellers, Piekarski would work in his office located on a different level of the building. Tr. at 628-30. Tellers also complained that Piekarski failed to show up on time for two successive Saturday shifts and had to be called at home. As a result, the bank did not open on time and customers had to wait. Tr. at 625-28. Testimony also showed that not only did Piekarski often criticize management's decisions, he discussed his criticisms with the staff in his department. Tr. at 441-42, 604, 852, 866, 1085, 1124-28. His supervisors

were aware of this practice, and believed that it engendered employee dissatisfaction and friction between departments. Tr. at 155, 300, 681, 908, 1013-14, 1129-30. As early as November 1982, Donley placed a note in Piekarski's file stating that he was "not convinced that [Piekarski was] doing his job." Pl.'s Ex. 36.

Piekarski was aware of management's dissatisfaction. Piekarski testified that Donley had brought many of the above problems to his attention. Tr. at 260-78. According to a 1982 note in Piekarski's file, Piekarski told Donley that he felt he was being unfairly criticized. Pl.'s Ex. 36. In the spring of 1938, Piekarski

scheduled a meeting with the chairman of the board because he perceived friction between management and himself. Tr. at 257. In January 1984, Piekarski was passed over for a promotion. Tr. at 902, 906.

Despite this ongoing conflict between Piekarski and management, Home Owners continued to employ Piekarski. In late 1987, however, Knutson Mortgage Corporation's pending acquisition of Home Owners motivated Donley to tell vice presidents, Jeffrey Vye and David Leabo that he sought to go forward with "the strongest, most cooperative staff possible." Tr. at 1200. On January 25, 1988, Vye, Piekarski's immediate supervisor, and Leabo told Piekarski

that he was being terminated because of corporate restructuring.[3] In fact, the "restructuring" that occurred involved only a change in personnel. Piekarski's position was not eliminated. Vye testified that the reason for informing Piekarski that his termination was a result of corporate restructuring rather than poor job performance was because it was easier, and provided Piekarski with a better chance of obtaining new employment. Tr. at 914. Whether it was Donley or Vye that actually recommended discharging Piekarski is disputed.

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[3] Donley did not tell Piekarski himself because he was recovering from a recent heart attack and was under doctor's orders to avoid stressful situations.

As a result of this discharge, Piekarski filed an action against Home Owners and Donley. Piekarski's action included claims for breach of a "for cause" employment contract, retaliatory discharge, misrepresentation, and tortious interference with contract. This case originally began in Minnesota state court where the judge scheduled a bifurcated trial on liability and damages and then presided over the liability phase. Upon the close of testimony, the court submitted special interrogatories to an advisory jury regarding Piekarski's claims of breach of employment contract, retaliatory discharge, and tortious interference with contract. The jury returned a verdict of

liability on all three claims, The court adopted this verdict and also found Donley liable on the remaining claim of misrepresentation and for punitive damages. *Piekarski v. Home Owners Savings Bank, F.S.B.*, 752 F.Supp.1451, 1458-59 (D.Minn.1990) (Minnesota state court opinion attached at Appendix A). Before the state court could reach the damages phase of the trial, however, the Resolution Trust Corporation became conservator of Home Owners' parent corporation and removed the case to federal court.[4] Minnesota federal district court thus held the damages

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[4] For a more thorough discussion of this case's procedural history, see *Piekarski v. Home Owners Savings Bank*, 743 F.Supp. 38 (D.D.C. 1990).

phase of the trial. The court found Home Owners and Donley jointly liable for $120,000 in damages to date of trial and $35,000 in lost future earnings. The court also found Donley liable for $25,000 in punitive damages. Finally, the court awarded Piekarski $152,564.50 in attorneys' fees and $10,307.07 in costs.

II.

Home Owners and Donley now appeal both the state court's findings on liability and the federal court's findings on damages. They essentially argue that there was insufficient evidence to support a finding of liability on any of the claims. because we are reviewing state court claims, the appropriate standard for

review is that applied by Minnesota appellate courts. Thus, the court should uphold the trial court's findings of fact unless they are clearly erroneous. Minn.R.Civ.P. 52.01. A finding is clearly erroneous if this court is left with a firm and definite conviction from a review of the entire record that a mistake has been made. *City of Minnetonka v. Carlson,* 298 N.W.2d 763, 766 (Minn.1980). When applying the facts to the legal requirements, however, this court need not defer to the trial court's conclusions. *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349, 354 (Minn. 1977). A thorough review of the entire record leaves us convinced that Piekarski did not

sustain his burden of proof on any of his claims. We will discuss each of these claims in turn.

A. Breach of Employment Contract

[2] It is undisputed that Piekarski was hired for an indefinite term, had no written employment contract, and could have left Home Owners at any time. Generally speaking, an employer can terminate such a relationship at any time and without good cause. *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876,882 (Minn.1986). Piekarski, however, alleges that Home Owners' personnel policies and numerous representations made to him created an implied, unilateral employment contract that modified this

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relationship. Specifically, Piekarski alleges that Home Owners could terminate him only for good cause and with fair warning. The state trial court agreed, and found that Home Owners and Donley had breached this contract.

[3] On appeal, Home Owners and Donley argue that a federal regulation preempts state contract law, and thus precludes a finding of a "for cause" employment contract between Home Owners and Piekarski. This regulation requires that all employment contracts between savings associations and its officers be in writing and approved by the association's board of directors. 12 C.F.R. ¶ 564.39(a) (1991) (first enacted in 1982). This preemption

argument involves a choice of law-does federal regulatory law or Minnesota state law govern the creation of an employment contract. Where preemption involves a choice of law, rather than a choice of form, it is an affirmative defense. *E.g., Dueringer v. General Am. Life Ins. Co.*, 842 F.2d 127, 130 (5th Cir.1988); *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1496-97 (9th Cir.1986). Under Minnesota Rule of Civil Procedure 8.03, failure to plead an affirmative defense constitutes waiver of the defense. Neither Home Owners nor Donley pled preemption. In fact, they did not even raise the issue until posttrial motions. Appellants thus waived this defense.

[4.5] Alternatively, Home Owners and Donley argue that Piekarski failed to prove a modification of his at-will contract. In Minnesota, an employer creates an implied employment contract of unspecified duration and with discharge limited to good cause if: (1) it communicates to the employee a definite offer of "for cause" employment; and (2) the employee accepts the offer and furnishes consideration. *E.g., Pine River State Bank v. Mettille,* 333 N.W.2d 622, 626 (Minn.1983). The employee's retention of employment, when free to leave, constitutes acceptance of the offer and the necessary

consideration.[5] *Id.*at 627. Because Piekarski continued to work for Home Owners until he was fired, the only issue is whether Home Owners communicated a definite offer of "for cause" employment to Piekarski. When determining whether an employer has made such an offer, the outward manifestations of the employer's

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[5] Even when the employer has not made a definite offer of "for cause" employment, an employee may create an implied "for cause" employment contract by providing consideration beyond personal employment services. *See, e.g., Bussard v. College of St. Thomas, Inc.*, 294 Minn. 215, 200 N.W.2d 155, 161 (1972). Piekarski does not assert that he provided any consideration beyond his personal employment services. *See Corum v. Farm Credit Servs.*, 628 F.Supp. 707 (D.Minn.1986) (holding that job specialization and foregoing other employment opportunities did not constitute the required consideration).

agents, rather than their subjective intent, are controlling. *Id.* at 626. We find no evidence that a definite offer of "for cause" employment was communicated to Piekarski.

[6] Initially, we reject Piekarski's argument that the job security representations made to him constituted definite offers of "for cause" employment. These representations consisted of a statement by Peterson, then president of Home Owners, that the mortgage loan officer position was a position with a "future," Pl's Ex. 3, and a statement in a letter from Peterson to all officers that his "goal for each of the officers and employees of this association is job security." Pl.'s

Ex. 11, 95, 107. Piekarski also testified that he was under the impression that he had job permanence, but did not testify to ever having been told this. Tr. at 83. Even if he had, however, the rule in Minnesota is that general statements regarding job permanence and job security are not definite offers. *Pine River State Bank,* 333 N.W.2d at 627; *Harris v. Mardan Business Sys., Inc.,* 260 Minn. 424, 110 N.W.2d 863, 965-66 (1961); employee handbook stated that "[employer] seeks to ensure the job security of all salaried employees," *Lewis,* 389 N.W.2d at 883; (Employee repeatedly told by employer that they would retire together) *Dumas v. Kesler & Maguire Funeral Home,* 380 N.W.2d

544, 547 (Minn.App.1986); employee told that employer would always take care of him, and that he was a lifetime sales representative, *Aberman v. Malden Mills Indus.*, 414 N.W.2d 769, 771-72 (Minn.App.1987). The statements made to Piekarski were no more specific than these representations.

[7] We also conclude that the Home Owners' by-law Piekarski relies on to support his contract claim does not constitute a definite offer of "for cause" employment. This by-law provides: "Any officer may be removed by the board of directors whenever in its judgment the best interests of the association will be served thereby, but such removal, other than

for cause, shall be without prejudice to the contractual rights, if any, of the person so removed." Pl's Ex. 29 (emphasis added). This simply means that if an officer has certain contract rights, and that officer is removed without cause, the officer's contract rights are not prejudiced. The by-law cannot be read as giving officers the contractual right to be fired only for cause and after notice *See Gates Rubber Co. v. Porwoll,* 395 N.W.2d 92, 96-97 (Minn.App.1986) (holding that a written termination policy that discussed the severance benefits of employees that were terminated for cause, but not of employees that were terminated without cause, was legally insufficient to

constitute an offer of "for cause" employment).

[8] Additionally, we reject Piekarski's argument that successful completion of a probationary period constitutes a definite offer of "for cause" employment. Although no Minnesota court has expressly addressed the impact of a probationary period on at-will employment, the Minnesota Supreme Court has implicitly reject this argument. In *Pine River State Bank*, the court noted in its factual discussion that the plaintiff-employee had "survived his 6-month probationary period," but its discussion of whether a "for cause" employment contract existed did not even mention this fact. 333 N.W.2d at

624; *see also Johnston v. Panhandle Co-op Ass'n,* 225 Neb.732, 408 N.W.2d 261, 265-66 (1987) (holding that a handbook provision providing for permanent employment after completion of a probationary period was not a definite offer). Moreover, testimony shows that all Home Owners' employees initially had a probationary period. Tr. at 681-81, 1081. If we were to accept Piekarski's argument, Home Owners would not have a single at-will employee.

[9] Piekarski's evidence that Home Owners had a policy of discharging employees only for cause and after notice also is legally insufficient to modify his at-will employment. Piekarski introduced

evidence that Donley "built files" on employees, that Home Owners had cause when it terminated two other officers, and that one of these officers had been given a warning before he was fired. Additionally, both the personnel director and the chairman of the board testified that employees generally are not fired except for cause. The problem with this evidence is that, even assuming it demonstrated a "for cause" policy, Piekarski introduced absolutely no evidence that anyone at Home Owners ever told him, either orally or in writing, that it was Home Owners' policy to discharge employees only for good cause and after notice. Tr. at 111, 297.

Numerous Minnesota cases have held that even though an employer has a policy limiting discharge to good cause and even though the employee had knowledge of that policy, there is no employment contract unless the employer communicated the policy to the employee.[6] *Cederstrand v. Lutheran Bhd.*, 263 Minn. 520, 117 N.W.2d 213, 221-22 (1962), *Makhsoos v. Minnesota Mining & Mfg. Co.*, No. C5-89-2080, 1990 WL 92850, at *3 (Minn.App. July 10,1990)(unpublished); *see also Pine River State Bank*, 333 N.W.2d at 626 (contract exists only if

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[6] For this reason, Home Owners' statements to Knutson Mortgage indicating that all officers would continue in their same capacities after Knutson acquired Home Owners also are legally insufficient to form a "for cause" contract.

handbook language constitutes an offer and "the offer has been communicated by dissemination of the handbook to the employee"); *cf. Skramstad v. Otter Tail County*, 417 N.W.2d 124, 126 (Minn.App. 1987)(no implied, unilateral contract regarding employee's sick leave because no evidence that policy ever provided to him as part of an offer); *Tobias v. Montgomery Ward & Co.*, 362 N.W.2d 380, 382 (Minn.App. 1985) (written meals allowance policy did not create unilateral contract because not communicated to employee).

[10] Finally, Piekarski argues that the trial court properly relied on circumstantial evidence to support its finding of a "for cause"

employment contract. Specifically, the court stated that the officers' annual appointment, annual salaries, and annual reviews were inconsistent with an at-will relationship. Not only is this assumption erroneous, this evidence cannot prove the existence of a "for cause" employment contract. A necessary element of such a contract is communication of a definite offer to the employee. If the employee never produces any evidence that such an offer was made, not even his own testimony, he cannot prove the existence of the contract solely through circumstantial

evidence.[7] Because Piekarski has not offered any evidence that we can construe as a definite offer of "for cause" employment, his claim for breach of contract must fail.

B. Retaliatory Wage Discrimination[8] and Discharge

[11] Piekarski also claims that Home Owners and Donley subjected him to retaliatory wage discrimination and

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[7] We are not saying that circumstantial evidence is never relevant. Certainly, if there is conflicting testimony over whether an offer was made, circumstantial evidence that a contract existed would support the plaintiff's credibility. In this case, however, there is no credibility issue.

[8] Although the state court did not make a specific finding of wage discrimination, the federal court awarded Piekarski damages for wage disparity beginning in 1984. *Piekarski*, 752 F.Supp. at 1454.

discharge, in violation of both statutory and common law. This claim stems from Piekarski's involvement in a mortgage loan that Home Owners made to the buyers of a house owned by Donley's parents. Piekarski became embroiled in a dispute between Donley's parents and the buyers of their home over the amount Donley's parents should pay for a septic system upgrade required by the FHA before it would insure the buyers' mortgage loan. The buyers eventually sued Donley's parents, and Piekarski was subpoenaed. Approximately three years later, Piekarski was discharged.

At the time of his discharge, Minnesota Statute § 181.932(1)(c)[9] prohibited employers from discharging or otherwise penalizing an employee because:

> (c) the employee refuses to participate in any activity that the employee, in good faith, believes violates any state or federal law or rule or regulation adopted pursuant to law.

Minn.Stat.Ann. § 181.932 (Supp.1992)(Historical and Statutory

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[9] Because this statute did not take effect until August 1, 1987, Minn.Stat. § 645.02 (1990), and was not retroactive, Minn.Stat. § 645.21 (1990), Piekarski has a statutory wage discrimination claim only for the time beginning in August 1987, and ending in January 1988, with his discharge.

Notes).[10] Piekarski alleges that Donley penalized him because: (1) he refused to either commit perjury at the trial involving Donley's parents or avoid the subpoena; and (2) he refused to violate FHA regulations requiring Donley's parents to escrow money for the septic system upgrade. We find both of these allegations completely without merit.

As to Piekarski's first allegation, we find no basis in the record for concluding that Donley

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[10] This statute was amended in 1988. *See* Minn.Stat. § 181.932(1)(c)(1990). Because "[n]o law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature," Minn.Stat. §645.21, and no such statement accompanied this amendment, the 1987 version of this provision applies to Piekarski's action.

wanted Piekarski to either perjure himself at the trial or avoid the subpoena. Piekarski does not even allege that Donley expressly requested such action. Rather, Piekarski claims that this request was implicit in the "stern, disapproving look" Donley gave him when Piekarski showed him the subpoena on the day of trial. Even assuming an implied request is sufficient, we find it clearly erroneous to conclude that Donley's "stern look" was a demand that Piekarski break the law in order to save his parents approximately

$1000.[11] Piekarski introduced no evidence that Donley supported his parents' position in the lawsuit. In fact, the record indicates that Donley thought his parents' position was unsound -- Donley told the buyers' attorney that he thought his parents were getting bad advice from a third party. Tr. at 405; Pl.'s Ex. 56. Additionally, there was no evidence that Donley had ever told Piekarski,

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[11] The record does not indicate the actual amount in dispute in this lawsuit. The buyers sought to collect approximately $2,300. It is unclear what Donley's parents thought they should pay. Their own testimony is that they were willing to pay the original estimate of $1600 for the upgrade. Piekarski, however, testified that at one point they felt they shouldn't pay over $900 and maybe not even that. Tr. at 134. Thus the disputed amount was apparently somewhere between $700 and $1400.

either directly or indirectly, that he should help his parents avoid paying for the septic system upgrade. Piekarski admitted that when Donley had previously threatened to "ask for Piekarski's job," Donley's anger stemmed from the fact Piekarski had involved him in his parents' transaction even though he had requested that he be kept out of it. Tr. at 321-24. Finally, Piekarski offered no evidence that Donley even attempted to determine how Piekarski actually testified at trial -- a trial which resulted in no clear winner or loser.

[12] In response to this lack of evidence, Piekarski argues that it does not matter whether Donley

actually wanted him to commit perjury, so long as he had a good faith belief that this is what Donley wanted. We reject this argument. *See Merkel v. Scovill, Inc.*, 573 F.Supp. 1055, 1063-64 (S.D. Ohio 1983)(employer must have actually wanted employee to commit perjury, employee's belief is not relevant). An employee cannot refuse to take action his employer has not requested he take. *See Hamann v. Gates Chevrolet, Inc.*, 723 F.Supp. 63, 65-66 (N.D.Ind. 1989)("[plaintiff] cannot be said to have refused to perform an illegal act, since she had not been requested to do anything illegal . . ."), *aff'd*, 910 F.2d 1417 (7th Cir. 1990). Additionally, if an employer did not want the employee

to take certain action in the first place, the employee's refusal to do so could never be cause for adverse employment action.

Piekarski's second allegation -- that Donley discharged him for refusing to violate FHA regulations -- also is without merit. The only specific FHA requirement Piekarski points to provides as follows:

> MORTGAGEE'S ASSURANCE OF COMPLETION FOR DEFERRED ONSITE IMPROVEMENTS. To facilitate the insurance of home mortgages before the completion of on-site improvements, HUD-FHA recognizes assurance of completion submitted on FHA Form 2300, Mortgagee's Assurance of Completion. An assurance of completion using FHA Form 2300 must be supported by an escrow of cash or a commercial letter of credit.

Pl.'s Ex. 23. This provision required an escrow account only if

Home Owners, through the use of Form 2300, wanted to obtain insurance on the buyers' loan prior to the completion of the septic system upgrade. It does not prohibit Home Owners from simply making the loan and obtaining the FHA insurance when the upgrade was later completed, which is apparently what occurred here.[12] Piekarski points to no other regulation requiring the establishment of an escrow account. Thus, even if Donley told Piekarski not to set up an escrow account, as Piekarski claims, this was not a request to violate the law. Moreover, even assuming that

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[12] There was no evidence that Form 2300 was used. Indeed, given that no escrow account was ever established, Piekarski could not have used Form 2300.

Piekarski had a good faith belief that failure to establish an escrow account did violate the law, Piekarski did not refuse Donley's request that he not set one up. Rather, he complied with Donley's request to let his parents leave their money in an interest-bearing account. Thus, Piekarski failed to establish the elements of his statutory retaliatory discharge claim.[13]

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[13] Because we conclude that Piekarski failed to establish a request and a refusal to violate the law, we need not fully address the element of causation. We note only that the evidence connecting Piekarski's involvement in Donley's parents' transaction with his discharge is extremely weak. There was uncontradicted evidence that management had problems with Piekarski long before this transaction ever arose, and that these same problems continued up until Piekarski's discharge more than three years after the transaction.

[13] In addition to his statutory claim, Piekarski argues that Donley's retaliatory actions violated the common law. We reject Piekarski's common law claim for retaliatory wage discrimination occurring after August 1, 1987, and retaliatory discharge occurring in 1988. Minnesota courts have not recognized a common law action for discharge based on refusal to violate the law that exists independently of the action under Minnesota Statute § 181.932(1)(c). *Maida v. Maxi-Switch Co.*, NO. CO-88-1344, 1989 WL 452 at 2 (Minn.App. Jan. 10, 1989); *see also Steinbach v. Northwestern Nat'l Life Ins. Co.*, 728 F.Supp. 1389, 1394 (D.Minn.1989)(finding that Minnesota

does not recognize a general common law claim for wrongful discharge and rejecting plaintiff's claim because it duplicated a statutory claim). Once the Minnesota legislature has drawn the line between employment disputes that genuinely implicate public policy and are actionable and those that are not, it is not for courts to redraw that line.

[14] We do believe, however, that Piekarski has a common law action for retaliatory wage discrimination occurring prior to enactment of the above statute in August, 1987. In *Phipps v. Clark Oil & Refining Corp.*, 408 N.W.2d 569, 571 (Minn. 1987), the Minnesota Supreme Court held that an at-will employee who was terminated in

1984 for refusing to violate the law had a common law action for wrongful discharge. The court relied on the Minnesota legislature's enactment of Minnesota Statute § 181.932(1)(c), discussed above, to support its conclusion. *Id.* Additionally, the court incorporated the requirements of this statutory action into the common law action. *Id.* Although this case involved a retaliatory discharge, we believe that the Minnesota Supreme Court would extend the common law claim to retaliatory wage discrimination occurring prior to August 1987. We do not believe, however, that Piekarski has established that the wage difference between himself and another vice

president was in retaliation for his refusal to violate the law. As noted above, it is completely unreasonable to believe that Donley requested Piekarski to commit perjury or avoid the subpoena, and Piekarski never refused to violate any FHA regulations. *See McIntire v. State*, 458 N.W.2d 714, 720-21 (Minn.App. 1990)(dismissing common law wrongful discharge claims because plaintiff never asked to violate the law), *cert. denied*, ____ U.S. _____, 111 S.C.t 970, 112 L.Ed.2d 1056 (1991). Accordingly, Piekarski's common law action for wage discrimination must fail.

C. Misrepresentation

[15] Piekarski's third claim is

that statements made to him by Donley regarding his job security constituted fraudulent misrepresentation. Under Minnesota law, a successful claim of fraudulent misrepresentation requires proof of the following elements: a false representation of past or present material fact that is susceptible to knowledge; the representor knew the fact was false or asserted it as her own knowledge without knowing whether it was true or false; the representor intended that the plaintiff act on the statement; the plaintiff, in fact, acted in justifiable reliance on the statement; the plaintiff suffered damage; and the statement was the proximate cause of this damage. *See, e.g., Florenzano v.*

Olson, 387 N.W.2d 168, 174 n. 4 (Minn. 1986).

[16] Our review of the record convinces us that the trial court was clearly erroneous in finding misrepresentation liability. The trial court relied on two alternative groups of statements as its basis for finding liability. The first group consists of statements made to Piekarski regarding his job performance. This group does not contain a single false representation of past or present fact. The trial court specifically cited to Piekarski's 1978, 1979 and 1981 annual reviews which indicated that his overall performance was good, although there were problems in specific areas.

The evidence shows that these reviews accurately reflected management's perception of Piekarski at the time. The court also cited to letters Piekarski received disclosing his annual salary increase.[14] *Piekarski*, 752 F.Supp. at 1469 (citing to Pl.'s Ex. 4-6, 28A, 28C, 28D). These letters made general statements such as "[y]our 1986 efforts on behalf of our Association are appreciated." Pl.'s Ex. 28D. Simply because Donley was dissatisfied with aspects of Piekarski's performance does not mean that he did not appreciate Piekarski's

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[14] Some of these letters, Pl.'s Ex. 4-6, 28C, were not even from Donley, and certainly cannot be the basis for holding Donley liable for misrepresentation liability.

efforts. Even assuming these statements were false, however, Piekarski cannot prove that he justifiably relied on them. There is undisputed evidence that Piekarski knew that management was dissatisfied with aspects of his performance. *See, e.g.*, Tr. at 143, 260-78. For example, a note in Piekarski's file indicated that he had complained about his 1987 salary and Donley had responded that it was a result of his past attitude and performance. Pl.'s Ex. 47, *see also* Tr. at 169 (Piekarski complained about 1986 salary).

The second group of statements the trial court relied on consists of statements made in 1987 regarding the impact of Knutson's acquisition on

employees' job security.[15]. This group arguably contains false representations of past or present fact. Specifically, Donley told employees that he would do his best to see that as many people as possible "went forward" with Home Owners after Knutson acquisition. Tr. at 175-77, 301-02, 1242. Under Minnesota law, a promise of a future act can constitute a misrepresentation if the promisor had no intent to perform at the time the promise was made. *Vandeputte v. Soderholm*, 298 Minn. 505, 216 N.W.2d 144, 147 (1974). The trial court

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[15] Some of these statements cannot constitute grounds for misrepresentation liability because they were not made to Piekarski. *See Piekarski*, 752 F.Supp. at 1470 (citing to Pl.'s Ex. 78, 80).

could have found that Donley intended to fire Piekarski when he made these statements. Assuming this is true, however, we find it unreasonable for Piekarski also to argue that Donley intended Piekarski to rely on these statements. It is highly unlikely that Donley would encourage Piekarski to continue his employment at Home Owners when he wanted to fire him. Additionally, we do not believe that Piekarski could justifiably rely on these statements. Not only was Piekarski well aware of Donley's dissatisfaction with his performance, Donley made these statements at general employee meetings -- not directly to Piekarski. Tr. at 301-02. Finally, Piekarski introduced no

evidence of detrimental reliance. These representations occurred in the last six months of Piekarski's employment. During this time, Piekarski did not decline pending job offers or pass up a concrete opportunity to look for other jobs.[16] *Cf. Dumas*, 380 N.W.2d at 548 (plaintiff must turn down other offers of employment to establish the detrimental reliance required for a promissory estoppel claim). Although

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[16] Piekarski generally testified that in the mid-1980s, prior to discussions about the Knutson acquisition, a couple of other employers had contacted him about job opportunities. Tr. at 112, 335. The only specific evidence introduced regarding alternative employment for Piekarski was that a year to 18 months prior to his termination, he sought a position at another bank. Tr. at 1131.

Piekarski did continue to work for Home Owners, he introduced no evidence that Donley's statements were a substantial factor in his remaining on the job or that his remaining on the job was detrimental.

In addition to the statements relied on by the trial court, Piekarski points to two more statements that supposedly justify misrepresentation liability: Donley's response to Piekarski's complaints about his 1986 salary was "I guess it just depends on where we place our emphasis," Tr. at 169, and Donley's response to Piekarski's inquiry as to how he could increase his 1987 salary was "the association w[ill] have to make more money." Tr. at 171. Given

Piekarski's knowledge about management's dissatisfaction with him, he certainly could not justifiably rely on these vague statements. In fact, Piekarski testified that he did not even understand what was meant by the latter statement. Tr. at 171.

[17,18] To further support a finding of misrepresentation liability, both Piekarski and the trial court emphasized Donley's failure to tell Piekarski that he was recording complaints in Piekarski's personnel file. A failure to disclose a material fact can constitute misrepresentation only if the defendant has a duty to disclose. *Stowman v. Carlson Cos.*, 430 N.W.2d 490, 493 9Minn.App. 1988). An

employer has no duty to disclose to an employee that he has placed items in his file. *See Hurley v. TCF Banking & Sav.*, 414 N.W.2d 584, 587-88 (Minn.Appp. 1987)(no duty to disclose unless official or fiduciary relationship exists); *cf. Stowman*, 430 N.W.2d at 493 (potential employer has no duty to disclose to a job applicant negotiations to sell the company). It would be incongruous to give employers the right to fire an at-will employee without warning, but to require employers to tell an employee every time they placed a note in his or her personnel file. Because Piekarski has not proven either justifiable reliance on a false statement or a duty to disclose, it is clearly erroneous to

find Donley liable for fraudulent misrepresentation.[17]

D. Tortious Interference with Contract

[19] Piekarski's final claim is that Donley tortiously interfered with the contractual relationship between himself and Home Owners. Although we concluded that Piekarski was an at-will employee, the Minnesota Supreme Court recently held that a tortious interference claim will lie for an at-will employment agreement. *Nordling v. Northern States Power Co.*, 478

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[17] We also reject Piekarski's claims of negligent and reckless misrepresentation. For purposes of this opinion, it is not necessary to discuss all the intricacies of these claims. We simply note that Piekarski's failure to prove justifiable reliance on a false statement is fatal to these claims.

N.W.2d 498, 504-505 (Minn.1991). A party, however, cannot interfere with its own contract. *Id.* Thus, if Donley was acting within the scope of his Home Owners' duties when he terminated Piekarski, his actions are those of the association and he cannot be liable for tortious interference. We find that Donley, as president, had the power to discharge employees of

Home Owners.[18] Despite this fact, Donley was not acting within the scope of his employment if his decision to fire Piekarski was motivated by actual

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[18] Piekarski argues that only the board had the power to discharge him. We find no evidence to support this. A Home Owners' by-law provides that "officers shall have such authority and perform such duties as the board of directors may from time to time authorize or determine. In the absence of action by the board of directors, the officers shall have such powers and duties as generally pertain to their respective offices." Pl.'s Ex. 29. Every board member that testified stated that Donley, as president, had the power to fire subordinate officers. Tr. at 744, 825-26; *see also* Tr. at 676 (testimony of ex-president Peterson). Although the evidence showed that the board was required to ratify the officers for each year, Tr. at 549, there is no dispute that the board ratified the officers for 1988, and that these officers did not include Piekarski. Tr. at. 547.

malice.[19] *Id.* at 506. Piekarski has the burden of proving actual malice. *Id* at 506. It does not include actions taken with a good faith belief, whether valid or not, that they will further the company's business. *Id.*

We find no evidence in the record that Donley fired Piekarski because he sought to injure him or Home Owners. In fact, the record indicates that Donley considered Piekarski a negative influence at Home Owners, and thought that his removal would benefit the company. Although the personality conflict between Piekarski and Donley

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[19] Although it is highly disputed whether Donley made the decision to fire Piekarski, for purposes of this section, we assume he did.

also could have prompted the termination, we find that this motive does not rise to the level of actual malice unless the reason for the personality conflict would give the employee a claim against the employer for wrongful discharge.[20] To hold otherwise would severely limit the doctrine of employment at will. Minnesota has long held that, with limited exceptions, an employer can discharge an at-will employee for any reason or no reason. *E.g., Phipps v. Clark Oil and Refining Corp.*, 396

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[20] For example, if Piekarski had established that the reason Donley did not like him was because he refused to perjure himself at Donley's parents' trial, Piekarski may have proven that actual malice motivated Donley's interference with his employment contract.

N.W.2d 588, 590 (Minn.App. 1986); Minn. Stat. §§ 181.932, 363.03(7)(1990). The exceptions prohibit an employer from discharging an employee in certain circumstances or for certain reasons. There is one exception to the employment-at-will doctrine that prohibits Piekarski from firing Donley because of a personality conflict stemming form Piekarski's tendency to criticize and disagree with Donley. And, as previously noted, it is unreasonable to conclude that the problems between Donley and Piekarski stemmed form Piekarski's refusal to violate the law. Thus, Donley, as Home Owners' president, could fire Piekarski because of their personality conflict without tortiously

interfering with the contract between Piekarski and Home Owners.

III.

Because we are overturning the trial court's finding of liability on all claims, it is not necessary to address the damages issues.

CONCLUSIONS

In conclusion, we reverse the trial court's finding of liability on all claims. Although Donley may have lacked "good cause" to fire Piekarski, Minnesota is an employment-at-will state. Thus, neither a court nor a jury can second guess Donley's decision unless Piekarski has proven all the elements of a recognized cause of action. Piekarski simply has failed to do this.

Peter R. PIEKARSKI, Plaintiff,

v.

HOME OWNERS SAVINGS BANK, F.S.B., f/k/a Western Minnesota Federal Savings and Loan Association, f/k/a Western Minnesota Savings and Loan Association, f/k/a Fergus Falls Savings and Loan Association; Knutson Mortgage Corporation, a Delaware corporation; Home Owners Federal Savings and Loan Association, a federally chartered savings and loan association; and M. Gene Donley, Defendants.

No. Div. 4-90-661

United States District Court
D. Minnesota, Fourth Division.

March 19, 1991.

Bank employee filed action against

bank, bank officer and parent corporations alleging wrongful termination of employment. Following trial on liability issues and removal from state court, defendant sought resolution of posttrial motions. The District Court, Devitt, J., held that: (1) law of case doctrine did not preclude review or modification of state court's liability decision if state court's rulings were clearly erroneous or manifestly unjust; (2) under Minnesota law, bank officer found to have terminated employee contrary to bank's best interest and for purpose of advancing officer's own personal interest could be held personally liable for tortious interference with contract; (3) there

was no basis for holding parent corporations liable; and (4) assuming that federal regulation terminated obligations under employment contracts in connection with receivership of parent corporation, this did not preclude award of front pay.

Motion to amend granted and post-trial motions otherwise denied.

1. Removal of Cases 114

In case removed from state court after trial on liability issues, law of the case doctrine did not preclude review or modification by federal district court of state trial court's liability decision if the state court's rulings were clearly erroneous or manifestly unjust, but federal district court did not occupy appellate rank vis-a-vis

the state court and would not entertain wholesale challenge to the evidence akin to a rehearing on the merits.

2. Removal of Cases 114

Upon removal, federal court must treat all state court rulings as if they had occurred in federal court.

3. Federal Civil Procedure 2294

Rule governing motion for amended findings of fact and conclusions of law does not provide avenue for relitigating issues on which moving party did not prevail at trial. Fed.Rules Civ.Proc.Rule 52(b), 28 U.S.C.A.

4. Trial 370(1)

Under Minnesota law, court sitting with advisory jury must view jury's

findings as advisory only and make appropriate findings independent of the jury, but trial court could adopt a verdict of advisory jury where, upon its own analysis, it agreed independently with the jury's determination. 48 M.S.A., Rules Civ.Proc., Rule 52.01.

5. Torts 12

Breach of one's own contract is not actionable under a tortious interference claim.

6. Torts 12

Acts of officer of contracting party within the scope of officer's duties constitute acts of the corporation, and thus the officer is shielded from personal liability for tortious interference with contract.

7. Torts 12

Under Minnesota law, bank officer found to have terminated employee contrary to the bank's best interest and for the purpose of advancing the officer's own personal interest could be held personally liable for tortious interference with contract.

8. Corporations 215

Parent corporations were not liable for retaliatory discharge of employee by subsidiary, even though subsidiary and other defendants on occasion sought protection of certain legal defenses available to parent by virtue of its receivership.

9. Master and Servant 41(2)

Assuming that federal regulation terminated bank's obligations under

employment contracts as a matter of law after Resolution Trust Corporation placed parent corporation in receivership, this did not compel conclusion that employment of particular employee, who had previously been subjected to retaliatory discharge, would have been terminated in absence of the wrongful discharge, and thus did not preclude award of front pay for retaliatory discharge beyond date of alleged termination of obligations pursuant to the receivership.

William P. Luther, Luther, Ballenthin & Carruthers, Minneapolis, Minn., for plaintiff.

Charles A. Mays and Lawrence P. Schaefer, Leonard, Street and Deinard, Minneapolis, Minn., for defendants.

ORDER

DEVITT, District Judge

INTRODUCTION

This wrongful termination from employment action comes before the court for the consideration of defendants' post-trial motions. Defendants move the court (1) for relief from the state district court's previous denial of defendants' post-trial motions pursuant to Fed.R.Civ.P. 60(b);p and (2) for amended findings of fact, conclusions of law and judgment pursuant to Fed.R.Civ.P. 52(b) and 59(e). In essence, defendants challenge the state district court's liability determination in all respects. Defendants also ask the court to

reexamine and modify the damage award. Plaintiff responds that the wholesale review sought by defendants is improper and that, in any event, the judgment is correct. For the reasons set forth below, the court grants defendants' motions insofar as they seek to relieve defendant Knutson Mortgage Corporation ("Knutson") and Home Owners-Boston of liability. The court denies defendants' motions to the extent they seek any further relief.

BACKGROUND

In November, 1988, plaintiff filed a complaint in Minnesota state

district court[1], alleging that defendants wrongfully terminated his employment with Home Owners Savings Bank of Fergus Falls. Minnesota ("Home Owners-Fergus Falls"). Trial of the liability issues commenced November 28, 1989 before the state district court and an advisory jury. The state district court issued findings of fact and conclusions of law on February 20, 1990, finding defendants liable upon plaintiff's breach of contract, wrongful discharge, and misrepresentation claims. The state district court also found defendant Donley liable for tortious interference with contract

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[1] Seventh Judicial District - Otter Tail County.

and punitive damages.

The state district court ordered that judgment be entered upon its finding of liability. Defendants then moved the state district court to amend its findings of fact, conclusions of law, and order for judgment and to vacate the entry of judgment on the ground that judgment was erroneously entered. The state district court summarily denied all of defendants' post-liability trial motions stated: "IT IS HEREBY ORDERED THAT all post trial motions are denied at the present time."

The case was removed subsequently to the United States District Court for the District of Minnesota and then remanded to Otter Tail County. Before

the state district court could determine damages, defendants removed the actions to the United States District Court for the District of Columbia under authority of recently enacted legislation designed to address the financial crisis plaguing this nation's savings and loan institutions. 12 U.S.C. § 1441a(l)(1), (3). That court then transferred the case, under 28 U.S.C. § 1404(a), to the District of Minnesota.

The damages phase of this action was tried to this court over three days commencing November 5, 1990. On December 6, 1990, the court issued its findings and order on damages, concluding that plaintiff was entitled

to receive $155,000 as compensatory and $25,000 as punitive damages from defendants. On January 30, 1991, the court awarded plaintiff $162,871.57 for attorneys' fees and costs and ordered that final judgment be entered for the entire amount of plaintiff's damage recovery and fee award. 755 F.Supp. 859 (D.Minn.1991). The court has since stayed the execution of this judgment pending resolution of defendants' post-trial motions.

DISCUSSION

[1] Plaintiff argues that the state district court's denial of defendants' previously filed post-trial motions is the law of the case and thwarts any post-trial review of the liability decision by this court. Defendants

urge, in essence, that the state court's ruling was untimely and "clearly erroneous."

"The doctrine of law of the case . . . 'expresses the practice of courts generally to refuse to reopen what has been decided.'" *Erie Conduit corp. v. Metropolitan Asphalt Paving Association*, 560 F.Supp. 305, 307 (E.D.N.Y.1983), aff'd, 765 F.2d135 (2d Cir.1985), *quoting, Messenger v. Anderson*, 225 u.S. 436, 444, 32 S.Ct. 739, 740, 56 L.Ed. 1152 (1912). Our Eighth Circuit Court of Appeals instructs that previously decided issues may be reconsidered "upon a showing of clear error or manifest injustice." *Liddell v. State of Missouri*, 731 F.2d 1294, 1304 (8th

Cir.1984), *cert. denied*, 469 U.S. 816, 105 S.Ct. 82, 83 L.Ed.2d 30 (1984); *Paulson v. Greyhound Lines, Inc.*, 628 F.Supp. 888, 891 (D.Minn. 1986), aff'd, 804 F.2d 506 (8th Cir.1986).

[2] Upon removal, the federal court must treat all state court rulings as if they had occurred in federal court. *In the Matter of Meyerland Co.*, 910 F.2d 1257, 1262-63 (5th Cir.1990), *rehearing granted en banc*, 921 F.2d 55, 56 (5th Cir.1990); *First Republic Bank Fort Worth v. Norglass, Inc.*, 745F.Supp. 1224, 1228 (N.D.Tex. 1990). That this case has been removed to federal court from the state district court does not limit the court's authority to correct clear errors or remedy manifest injustice.

Resolution Trust Corp. v. Security Town Co., 745 F.Supp. 1216, 1221-22 (E.D. La.1990) (law of the case doctrine does not preclude a federal court upon removal from correcting state court rulings and granting appropriate relief). Thus, the law of the case doctrine does not preclude review or modification of the state district court's liability decision or denial of defendants' previously filed post-trial motions if the state district court's rulings were clearly erroneous or manifestly unjust.

[3] Similarly, the purpose of a motion for amended findings of fact and conclusions of law under Fed.R.Civ.P. 52(b) is to permit the court to remedy "manifest errors of

law of fact." *Clark v. Nix*, 578 F.Supp. 1515, 1516 (S.D.Iowa 1984), *modified, Clark v. Brewer*, 776 F.2d 226 (8th Cir.1985); *Evans, Inc. v. Tiffany*, 416 F.Supp. 224, 244 (D.Ill.1976). Rule 52(b) does not provide an avenue for "relitigating issues upon which the moving party did not prevail at trial." *DeGidio v. Pung*, 125 F.R.D. 503, 505 (D.Minn.1989), *aff'd*, 920 F.2d 525 (8th Cir.1990); *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207,1219 (5th Cir.1986) (motion to amend findings does not secure a rehearing on the

merits).[2] Defendants bear a heavy burden in seeking to demonstrate clear

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[2] Defendants appear to contend that the state district court's denial of defendants' previously filed post-trial motions was procedurally improper. *See, e.g., Bygott v. Leaseway Transportation Corp.*, 637 F.Supp. 1433, 1438-39 (E.D.Pa. 1986), *rev'd. on other grounds*, 1987 Westlaw 54392 (3rd Cir.1987) (under federal rules, judgment entered after the liability phase of a bifurcated trial is not a final judgment subject to amendment; *In the Matter of the Commodore Hotel Fire and Explosion Case*, 318 N.W.2d 244, 246 (Minn.1982) (judgment entered after liability phase of bifurcated trial is not a final judgment and, therefore, not appealable). The court finds this argument of no consequence and declines to address it in substance. The principles and authority guiding this court's review of the state district court's liability decision appear substantially identical regardless of whether the state district court's summary denial of defendants' motions was procedurally proper.

error or manifest injustice.

[4] With these guiding principles in mind, the court reviews defendants' specific requests for relief. Defendants first contend that the findings of fact and conclusions of law respecting liability must be rejected entirely because the state district court improperly adopted the advisory jury's findings. Under Minnesota law, a court sitting with an advisory jury "must view [the jury's] findings as advisory only and make appropriate findings independent of the jury." *Pedro v. Pedro*, 463 N.W.2d 285, 288 (Minn.Ct.App.1990) (state district court's mere adoption of advisory jury's findings and verdict without independent findings held

erroneous), *citing*, Minn.R.Civ.P. 52.01. Here, the state district court adopted the verdict of the advisory jury and issued a twenty-nine page memorandum analyzing the liability evidence in detail.[3] This memorandum does not appear simply to rationalize or affirm the jury's verdict. On the contrary, the state district court indicated that it "agreed" independently with the jury's determination. Memorandum at 19, 23. The state district court also recognized explicitly its obligation to "review all of the evidence and determine whether" plaintiff had proved his case. Memorandum at 5.

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[3] The state district court's memorandum will be cited as "Memorandum."

The state district court's memorandum reflects independent consideration, and does not reveal that the state court clearly erred by improperly adopting the verdict of the advisory jury.

Defendants next challenge the state district court's liability determination on the ground that the evidence was insufficient to support each of plaintiff's claims. As noted above, the federal rules governing post-trial procedure do not provide an avenue for wholesale challenge akin to a rehearing on the merits. However, by challenging the evidence supporting each of plaintiff's claims, defendants effectively seek microscopic reexamination of the entire liability

record. The court has previously expressed its unwillingness to scrutinize and challenge the findings of the state district court. The state court witnessed the liability testimony firsthand, evaluating the veracity of often conflicting evidence, and explained the basis for its decision. Further, this court does not occupy an appellate rank vis-a-vis the state district court.

Nonetheless, in deciding plaintiff's motion for attorneys' fees and costs, the court became relatively familiar with that portion of the liability record pertaining to plaintiff's retaliatory discharge claim. Based upon this knowledge, the court has concluded that sufficient evidence

supports this claim. *See, Piekarski v. Home Owners Savings Bank*, 755 F.Supp. 859, 861-62, 862 (D.Minn.1991).[4] Plaintiff's victory on his retaliatory discharge claim entitles him to the full amount of the compensatory damage and attorneys' fee awards.

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[4] After examining the state district court's memorandum, this court concluded that the state court found defendants liable for retaliatory discharge under both Minn.Stat. § 181.932 and the common law. Defendants now contend that plaintiff could not have recovered under the common law of wrongful discharge because Minn.Stat. § 181.932 provides an exclusive remedy for such claims. The court finds this argument perplexing as defendants previously argued, in opposition to plaintiff's motion for attorneys' fees, that "Piekarski's retaliation claim arose under the common law."

[5-7] Defendant Donley argues that he may not be held liable on plaintiff's intentional interference with contract claim. A breach by defendant of his own contract is not actionable under a tortious interference claim, and "[t]he acts of a corporate officer within the scope of his or her duties constitute the acts of the corporation, and the officer is thus shielded from personal liability for tortious interference with contract." *Nordling v. Northern States Power Company*, 465 N.W.2d 81, 86-87 (Minn.1991). However, the Minnesota Supreme Court has suggested that a corporate officer may be held liable for tortious interference where he acts "outside the scope of the best

interest of the corporation or with malice for his own personal interest." *Bouten v. Richard Miller Homes, Inc.*, 321 N.W.2d 895, 901 (Minn.1982). Here, the state district court found that Donley terminated plaintiff (1) contrary to defendant Home Owners' best interests and (2) for the purposes advancing his own personal interests. The state court's interpretation of Minnesota law and factual findings are neither clearly erroneous nor manifestly unjust, and the court declines to absolve defendant Donley of personal liability for tortious interference with contract or punitive damages.

Having found the evidence sufficient to support plaintiff's

retaliatory discharge claim, and having declined to amend the state district court's findings and conclusions respecting tortious interference, the court need not address defendants' remaining challenges to the sufficiency of the evidence. The above conclusions entitle plaintiff to the entire damage and fee awards determined by the court. Assuming, *arguendo*, there is sufficient evidence to support plaintiff's remaining claims, the amount of the judgment remains unchanged.

[8] Defendants Home Owners-Boston and Knutson argue that they may not be

held liable for plaintiff's judgment.[5] In this regard, the state district court found:

> The evidence presented at trial indicates that Piekarski was never employed directly by Knutson, or by Home Owners of Boston, or by Donley in his individual capacity. * * * Neither Knutson nor Home Owners of Boston suggested or gave any orders for personnel changes at Home Owners [Fergus Falls]. There is no evidence that Knutson or Home Owners of Boston were personally involved in the termination of Piekarski or the decision to terminate.

Memorandum at 1-2. Plaintiff has cited no authority, and the court has found none, under which defendants Home Owners-Boston or Knutson may be

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[5] Home Owners-Fergus Falls was the wholly owned subsidiary of Knutson at the time of plaintiff's termination. Knutson was, in turn, the wholly owned subsidiary of Home Owners-Boston.

held liable.[6] The court will amend the judgment to relieve defendants Home Owners-Boston and Knutson of liability.

[9] Defendants argue that the court must modify plaintiff's damage award

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[6] In his brief in opposition to defendants' posttrial motions, plaintiff contends that "Donley has testified that these parent companies have total control over his conduct." The court has examined the deposition testimony relied upon by plaintiff to support this assertion and concludes that plaintiff's argument misrepresents Donley's testimony and is without merit. Plaintiff also argues that defendants Knutson and Home Owners-Boston have participated in this litigation "by consent." All defendants have, on occasion, sought protection from certain legal defenses available to Home Owners-Boston by virtue of its RTC receivership. However, plaintiff has failed to cite authority or otherwise explain how this justifies a finding of liability against these two entities.

for two reasons. First, defendants contend that 12 C.F.R. § 563.39 precludes an award of front pay beyond April 30, 1989, three days after the Resolution Trust Corporation placed Home Owners-Boston in receivership. The court addressed this argument previously in its findings and order on damages, and concluded that defendants had failed to demonstrate that plaintiff's employment would have been terminated under authority of the regulation. *Piekarski v. Home Owners Savings Bank*, 752 F.Supp. 1451, 1456 (D.Minn.1990). The court assumes, *arguendo*, that 12 C.F.R. § 563.39 terminates an institution's obligations under employment contracts as a matter of law. This does not

compel the conclusion that plaintiff's employment would have been terminated. At most, the regulation terminates *obligations* under employment contracts; it does not require institutions to discharge employees. The court refuses to amend plaintiff's award of front pay.

Second, defendants argue that the evidence cannot support a damage award for retaliatory wage discrimination , beginning in January, 1984. According to defendants, actionable retaliation could have occurred only after plaintiff's testimony in the September, 1984 Donley-Gerhardson lawsuit; thus, the first salary determination which could have been affected improperly was plaintiff's

1985 wage. However, the factual predicate underlying plaintiff's damage award for retaliatory wage discrimination commencing in 1984 is plaintiff's good faith refusal to violate FHA regulations respecting the establishment of an escrow account during the sale of defendant Donley's parents' residence. Plaintiff communicated his unwillingness to violate FHA regulations to defendant Donley in 1983, and the state district court found specifically that defendant Donley's treatment of plaintiff "[d]uring and after the matter with Donley's parents" was tainted with retaliatory disdain. This court views the state district court's findings with profound

deference, and refuses to eliminate plaintiffs' award for adverse salary determinations commencing in 1984.

Finally, the court, having considered the factors set forth in *Hilton v. Braunskill*, 481 U.S. 770, 776-77, 107 S.Ct. 2113, 2119, 95 L.Ed.2d 724 (1987) regarding the issuance of a stay pending appeal, concludes that a stay of the execution of judgment pending appeal is appropriate in this action upon terms identical to those described in the court's order staying the execution of judgment pending resolution of post-trial motions dated February 27, 1991 [clerk's entry 50].

CONCLUSION

Based upon the files, briefs, and

arguments of counsel,

IT IS ORDERED that:

1. Defendants' motion to amend the judgment [clerk's entry 37] to relieve defendants Knutson Mortgage Corporation and Home Owners-Boston of liability is GRANTED;

2. Defendants' post-trial motions, to the extent they seek any further relief, are DENIED;

3. The execution of judgment in this matter is stayed pending the outcome of an appeal, if any, upon terms identical to those described in the court's order staying the execution of judgment pending resolution of post-trial motions dated February 27, 1991 [clerk's entry 50].

Peter R. PIEKARSKI, Plaintiff

v.

HOME OWNERS SAVINGS BANK, F.S.B., f/k/a Western Minnesota Federal Savings and Loan Association, f/k/a Western Minnesota Savings and Loan Association, f/k/a Fergus Falls Savings and Loan Association; Knutson Mortgage Corporation, a Delaware corporation; Home Owners Federal Savings and Loan association, a federally chartered savings and loan association; and M. Gene Donley, Defendants.

Civ. No. 4-90-661

United States District Court, D. Minnesota, Fourth Division

Jan. 30, 1991.

An employee who prevailed in retaliatory discharge case filed a motion for an award of attorney fees and costs. The District Court, Devitt, J., held that: (1) although employee was awarded damages for acts

occurring prior to effective date of attorney fee provision, the retaliatory employment action was taken after effective date of statute; (2) once employee established retaliatory discharge injury, he was entitled to recover attorney fees and costs under statute; (32) attorney fees of $152,564.50 would be awarded, after adjustment for time spent pursuing unsuccessful remand motions; and (4) employee was not entitled to recover expenses incurred directly by him, rather than by his attorney.

Motion granted.

1. Master and Servant 46

Fact that state district court found employers liable on an employee's retaliatory discharge claim without

citing Minnesota retaliatory discharge provision did not preclude an award of attorney fees to employee under Minnesota statute authorizing attorney fees to employee who brought a civil action to recover damages recoverable for wrongful discharge for refusal to participate in unlawful activity, where language of questions used in advisory jury findings mirrored statutory language and indicated that liability was at least partially based on statutory cause of action. M.S.A. § 181.935(a).

2. Master and Servant 46

In a retaliatory discharge case, fact that employee was awarded damages for acts occurring prior to effective date of statute authorizing recovery of

attorney fees by employee did not compel conclusion that liability was grounded exclusively in the common law where wrongful discharge occurred well after effective date of statute. M.S.A. §§ 181.932, 181.935(a).

3. Master and Servant 46

Under Minnesota wrongful discharge attorney fee provision, once employee established damages based on discharge or other employer action discriminating against or penalizing the employee for refusal to participate in an activity the employee believed in good faith to violate the law, the employee was entitled to recover attorney fees and costs under the statute. M.S.A. §§ 181.01 et seq., 181.145, subd. 4(b),

181.75, Subd. 4, 181.935, 181.935(a), 181.0956, 181.956, subd. 2.

4. Master and Servant 46

Proper method for determining amount of attorney fees which could be recovered by employee who prevailed in retaliatory discharge case under Minnesota attorney fee statute was to determine the "lodestar" figure, by multiplying number of hours reasonably expended on litigation by reasonable hourly rate, excluding duplicative or inordinate hours, then consider criteria which could justify an increase or decrease in fee award including "results obtained." M.S.A. §§ 80A.23, 181.935(a), 363.14, subd.3.

5. Master and Servant 46

Attorney fees awarded to employee who

prevailed in retaliatory discharge case would not be reduced for hours spent on breach of contract, intentional interference with contract, misrepresentation and age discrimination claims, which were substantially related to wrongful discharge claim and required discovery and analysis of common core of facts surrounding employee's termination from employment. M.S.A. §§ 181.932, 181.935(a).

6. Master and Servant 46

Attorney fee award to employee who prevailed on retaliatory discharge claim would be reduced for hours spent pursuing remand motions and opposing removals and transfer motions which were mostly unsuccessful. M.S.A. §§

181,.932, 181.935(a).

7. Master and Servant 46

Lodestar attorney fee award for employee who prevailed in retaliatory discharge case would be calculated using lead counsel's requested hourly fee of $165, rather than $125 rate allegedly charged in city where employer was located in light of experience and expertise of plaintiff's lead counsel and absent evidence that attorneys of the caliber of lead attorney performing work of the type in employer's city would receive lower fee. M.S.A. § 181.935(a).

8. Costs

Conclusory statements were insufficient to warrant upward

adjustment of lodestar attorney fee award. M.S.A. §§ 181.932, 181.935(a).

9. Master and Servant

Employee who prevailed in retaliatory discharge case could not recover as "costs" expenses incurred directly by the employee as opposed to employee's attorney.

10. Master and Servant

Reduction of total costs by the same percentage by which retaliatory discharge plaintiff's attorney fee request was reduced was the appropriate method for calculating costs to be awarded to wrongful discharge plaintiff where court had no accurate means to assess precisely which costs were incurred solely for purpose of prosecuting unsuccessful

remand motions. M.S.A. § 181.935(a).

William P. Luther, Luther, Ballenthin & Carruthers, Minneapolis, Minn., for plaintiff.

Charles A. Mays and Lawrence P. Schaefer, Leonard, Street and Deinard, Minneapolis, Minn., for defendants.

ORDER

DEVITT, District Judge.

The damages phase of this wrongful termination from employment action was tried to the court over three days commencing November 5, 1990. On December 6, 1990, the court issued its findings and order on damages, concluding that plaintiff was entitled to receive $155,000.00 as compensatory and $25,000.00 as punitive damages

from defendants.[1]

This matter is presently before the court upon plaintiff's motion for an award of $215,535.07 in attorneys' fees and costs pursuant to Minn.Stat. § 181.935(a).[2] For the reasons set forth below, the court awards plaintiff attorneys' fees and costs though in an amount less than requested.[3]

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[1] The facts and procedural history of this litigation are detailed in the court's findings and order on damages and the appendix thereto, and need not be repeated here. *See Piekarski v. Home Owners Savings Bank, F.S.B., et al.*, 752 F.Supp. [45] (D.Minn.1990).

[2] This order addresses costs and fees incurred through December 18, 1990.

[3] In the interest of efficiency, the state district court's *Findings of Fact, Conclusions of Law and Order for Judgment* and supporting *Memorandum* will be cited simply as "Findings" and "Memorandum."

Discussion

The court may grant plaintiff's motion for attorneys' fees only if a statute or contractual provision authorizes such an award. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 95 S.Ct. 1612, 1616, 44 L.Ed.2d 141 (1975); *Jacobs v. Rosemount Dodge-Winnebago South*, 310 N.W.2d 71, 79 (Minn.1981). Plaintiff contends that an award of attorneys' fees is appropriate under Minn. Stat. § 181.935(a). Defendants oppose plaintiff's motion, arguing that the statute relied upon by plaintiff does not apply and that no other applicable statute authorizes an award of attorneys' fees. In the alternative, defendants argue that the

court should award plaintiff significantly less than he seeks to recover.

Minn. Stat. § 181.935(a) provides:

> In addition to any remedies otherwise provided by law, an employee injured by a violation of section 181.932 may bring a civil action to recover any and all damages recoverable at law, together with costs and disbursements, including reasonable attorney's fees, and ma6y receive such injunctive and other equitable relief as determined by the court.

Defendants advance essentially three grounds to support their contention that Minn.Stat. § 181.935(a) is inapplicable. First, the state district court, in determining liability, did not cite Minn.Stat. § 181.932. Second, according to defendants, the evidence submitted during the liability phase was

insufficient to establish a violation of Minn.Stat. § 181.932. Finally, defendants argue that the nature of this court's damage award demonstrates that Minn.Stat. § 181.935(a) does not apply to this action.

[1] The court is not persuaded by these arguments and finds that Minn.Stat. § 181.,935(a) applies to this case. Defendants correctly point out that the state district court found defendants liable on plaintiff's retaliatory discharge claim without citing Minn.Stat. § 181.932, and that plaintiff may recover attorneys' fees under section 181.935(a) only if he was "injured by a violation of [Minn.Stat. §] 181.932." Min.Stat. § 181.935(a). Section 181.932 provides,

in pertinent part:

> Subdivision 1. Prohibited action. An employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:
>
> * * *
>
> (c) the employee refuses to participate in any activity that the employee, in good faith, believes violates any state or federal law or rule or regulation adopted pursuant to law.[4]

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[4] The legislature amended Minn.Stat. § 181.932, subd. 1(c), in April, 1988, to read:

> (c) The employee refuses an employer's order to perform an action that the employee has an objective basis in fact to believe violates any state or federal law or rule or regulation adopted pursuant to law, and the employee informs the employer that the order is being refused for that reason.

See 1988 Minn.Laws ch. 639, § 2. Evidently, the parties dispute which of the above versions of Minn.Stat. §

That the state district court did not cite Minn.Stat. § 181.932 does not perforce indicate that the state court grounded liability exclusively upon the common law of wrongful discharge. At the close of evidence during the liability phase of this action, the state district court submitted a verdict form to the advisory jury. With respect to plaintiff's

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181.932, subd. 1(c) applies, though neither party details the substance of this dispute. That plaintiff was wrongfully terminated in January, 1988, prior to the date the amended version was passed, suggests strongly to this court that the pre-1988 version of Minn. Stat. § 181.932(c) applies. *See* Minn.Stat. § 645.02. Minnesota statutes are not to be given retroactive effect "unless clearly and manifestly so intended by the legislature." Minn. Stat. § 645.21.

retaliatory discharge claim, the form completed by the jury reads, in part:

> 2. RETALIATORY DISCHARGE:
>
> * * *
>
> B. Did the defendants terminate plaintiff's employment because the plaintiff refused to participate in any activity that he in good faith believed violated any state or federal law or rule or regulation?
>
> NO__ YES_X_
>
> C. Did plaintiff inform his employer of his reasons for the refusal?
>
> NO__ YES_X_

Findings, at 3. The state district court adopted the advisory jury's findings as its own. The language of these questions mirrors the language of Minn.Stat. § 181.932, Subd. 1(c), and indicates convincingly that the state district court found defendants

liable, at least in part, upon plaintiff's statutory cause of action. Indeed defendants acknowledged that "yes" answers to the above two questions would amount to a finding by the jury that both versions of Minn.Stat. §181.932, subd. 1(c) had been violated.[5]

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[5] During a conference absent the jury, the following colloquy occurred concerning the form of the verdict questions to be submitted to the jury:

THE COURT: Just so we are clear, what we are talking about is Minnesota Statute 181.932 Subd. 1(c) and Subd. C(6). That statute was changed effective '88, and what we had originally done is drafted question 2B to ask the jurors whether or not there had been a violation of that statute as it exi[s]ted before '88, and question 2C to determine whether or not there had been a violation of the statute as it had been amended and was in effect after 1988. And what we have done here is by the two questions we have agreed on, 2B and 2C have

[2] Defendants' argument that the evidence adduced at the liability phase is insufficient to sustain liability under Minn. Stat. §181.932 may be addressed briefly. The state district court held specifically that sufficient evidence supported the jury's findings. Memorandum, at 19. This court is in a poor position to find fault with the state district court's conclusions concerning liability under Minn.Stat. §181.932 as the state district court is profoundly

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indicated that if they answer both questions yes, then we will acknowledge that there has been a violation of subdivision 1(c) prior to '88 and after '88.

MR. SCHAEFER [counsel for defendants]; We would acknowledge the jury made that finding.

more familiar with the evidence relevant to liability. However, upon reviewing the state court's thorough memorandum and much of the liability trial record, this court is satisfied that the state court's conclusions concerning liability under Minn.Stat. § 181.932 are amply supported.[6]

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[6] The state district court specifically found that plaintiff was terminated, at least in part, for his refusal to commit perjury during trial of the matter concerning Donley's parents:

> Piekarski was subpoenaed to testify in favor of the Gerhardsons and he informed Donley of his being subpoenaed. When Donley saw the subpoena he gave Piekarski a stern look before turning his back and walking away without saying a word. Based upon prior discussions with Donley concerning this matter, and the reaction of Donley to the subpoena, Piekarski, in good

employment action' claim must sound in common law and cannot be used as a predicate for an award of attorneys' fees." This conclusion is only partially correct. As Minn.Stat. §181.932 may not be applied retroactively, defendants' liability for wage discrimination from January, 1984 through the effective date of Minn.Stat. § 181.932 must be grounded in common law.[7] However, defendants

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[7] In its findings and order on damages, this court assumed, without deciding, that a two-year statute of limitations applied to plaintiff's wage discrimination claim and held that plaintiff's claim survived under the doctrine of continuing violation. The doctrine of continuing violation "serv[e]s to toll otherwise applicable time bar limitations" but does not allow retroactive application of a statute to conduct occurring prior to its effective date. *Melani, et al. v. Board of Higher Education of City of New York*, No 73 Civ. 5434, 1976 Westlaw 589 at *(S.D.N.Y. 1976).

wrongfully discharged plaintiff in January, 1988, well after the effective date of the statute, and defendants may be held liable under Minn.Stat. §§ 181.932 and 181.935 for any retaliatory employment action taken after the statute's effective date. That this court awarded damages for acts occurring prior to the effective date does not compel the conclusion that liability is grounded exclusively in common law.

[3] Defendants argue that plaintiff's status as a prevailing party does not, *ipso facto*, justify an award of attorneys' fee, and that Minn.Stat. §181.935(a) affords this court discretion in deciding whether to award plaintiff attorneys' fees and

costs. Specifically, defendants point to Minn.Stat. 181.145, subd. 4(b), which provides that employers who lose disputes with commissioned salespersons over wages . . . *shall* pay reasonable attorneys' fees." (emphasis supplied). According to defendants, had the legislature intended that the fee provision in section 181.935 be mandatory, it would have used similarly commanding language. The parties have not cited, and the court is unable to find, any authority interpreting Minn.Stat. § 181.935(a). However, other cases construing attorney fee provisions containing language identical to Minn.Stat. § 181.935 make it clear that once a plaintiff establishes

injury, he is entitled to recover attorneys' fees and costs. *Bucko v. First Minnesota Savings Bank, F.S.B.*, 452 N.W.2d 244, 252 (Minn.Ct.App.1990)("Because . . . respondents established in jury under the statute, they are entitled to costs, including attorney fees, under Minn.Stat. § 181.75, subd.4"); *see Liess v. Lindemyer*, 354 N.W.2d 617, 618 (Minn. 1988); *Love v. Amsler*, 4441 N.W¢2d 555, 560 (Minn.Ct.App. 1989). The court concludes, therefore, that an award of attorneys' fees under Minn.Stat. § 181.935(a) is

appropriate.[8]

[4] The court next determines the amount of the fee award. As noted earlier, research has revealed no authority analyzing Minn.Stat. § 181.935(a). In the context of at least two other statutes, however, the Minnesota Supreme Court has reviewed

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[8] Defendants suggest that, in awarding attorneys' fees, this court look to a separate provision of chapter 181, Minn.Stat. § 181.956, outlining the remedies available to employees injured by violations of the "Drug and Alcohol Testing in the Workplace" statute. Section 181.956 permits an award of attorneys' fees to prevailing plaintiffs only in the presence of a "knowing and reckless" violation. Minn.Stat. § 181.956, subd. 2. The court does not agree that the knowing and reckless standard applies to actions under Minn.Stat. § 181.935(a). Had the legislature intended that this higher standard apply, it would have expressed as much within the text of section 181.935(a).

fee awards under the analysis set forth in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). *Anderson v. Hunter, Keith, Marshall & Co.*, 417 .W.2d 619, 628-30 (Minn. 1988)(Minnesota Human Rights Act, Minn.Stat. § 363.14, subd. 3); *Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520, 540-43 (Minn. 1986)(act regulating security transactions in Minnesota, Minn.Stat. § 80A.23.). The *Hensley* analysis thus appears appropriate here.

Hensley first requires the court to determine the "lodestar" figure. "This figure is determined by multiplying the 'number of hours reasonably expended on the litigation . . . by a reasonable

hourly rate.'" *Anderson*, 417 N.W.2d at 628; *quoting Hensley*, 461 U.S¢ at 433, 103 S.Ct. at 1939.[9] The court must exclude from the lodestar calculation duplicative or inordinate hours. *Specialized Tours, Inc.* 392 N.W.2d at 542. In ascertaining a "reasonable hourly rate," the court is to consider "the ordinary fee for similar work in the community." *Jaquette v. Black Hawk County, Iowa*, 710 F.2d 455, 459 (8th Cir. 1983)(citations omitted). The court must also consider a number of criteria that may justify either an

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[9] The party seeking a fee award bears the burden of establishing entitlement to the amount requested and documenting the hours expended and hourly rates. *Hensley*, 461 U.S. at 437, 103 S.Ct. at 1941.

increase or decrease in the fee award. *Id.* 461 U.S. at 430, 103 S.Ct. at 1937, n.3. Chief among these is the factor of the "'results obtained.'" *Id.*, 461 U.S. at 434, 103 S.Ct. at 1940. In addressing this factor, the court must disallow fees for hours spent in the unsuccessful pursuit of claims that are "'distinct in all respects'" from the successful claims. *Catlett v. Missouri Highway and Transportation Commission*, 828, F.2d 1260, 1270 (8th Cir. 1987), *cert. denied*, 485 U.S. 1021, 108 S.Ct. 1574, 99 L.Ed.2d 889 (1988); *citing, Hensley*, 461 U.S. at 440, 103 S.Ct. at 1943. However, "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully

compensatory fee." *Hensley*, 461 U.S. at 435, 103 S.Ct. at 1940.

[5] Here, defendants present several bases for reducing the fee award requested by plaintiff. First, defendants contend that plaintiff incurred substantial fees pursuing substantive claims unrelated to the retaliatory discharge claim. Specifically, defendants focus upon plaintiff's breach of contract, intentional interference with contract, misrepresentation, and age discrimination claims. Plaintiff, in response, argues that these claims are substantially related. Plaintiff prevailed upon his breach of contract, intentional interference with contract, and misrepresentation

claims.[10] Further, the court finds that these claims, including plaintiff's age discrimination claim, are not "distinct in all respects" from plaintiff's retaliatory discharge claim. Each claim, though containing certain discrete elements, required discovery and analysis of a "common core of facts" surrounding plaintiff's termination from employment, and the success of each claim depended, in large part, upon plaintiff's ability to show that defendants' adverse employment decisions stemmed from defendant M. Gene Donley's improper

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[10] That plaintiff prevailed upon these claims is significant as the *Hensley* analysis seems to preclude fee recovery for time devoted to the pursuit of claims that are both unrelated and, at the same time, unsuccessful.

motives.

[6] Second, defendants contend that any fee award should be reduced because plaintiff unsuccessfully pursued remand motions and opposed removals and transfer motions distinct from the substantive merits of this action. As noted earlier, this case, though a "run-of-the-mill" wrongful termination from employment action, journeyed among state and federal courts in Minneapolis, St. Paul, and Fergus Falls, Minnesota to federal district court in Washington, D.C. prior to alighting before this court. *See Piekarski v. Home Owners Savings Bank, et al.*, 743 F.Supp. 38, 39-41, 43 (D.D.C. 1990). Plaintiff did not suffer defeat at every turn in his

efforts at obtaining venue in Fergus Falls as he prevailed upon his first remand motion before this court in June, 1990. However, plaintiff's subsequent efforts at resisting defendants' removal and transfer motions proved altogether fruitless. The court finds plaintiff's remand efforts generally unsuccessful and entirely distinct from plaintiff's substantive claims. *See, Main Line Paving Co. v. Board of Education, School District of Philadelphia*, No. 89-0821 Civ. 1990 Westlaw 31697 at *6-*7 (E.D.Pa.1990)(time spent litigating unsuccessful remand motions that are distinct from substantive claim would be eliminated from fee award calculation). Upon reviewing the time

records submitted by plaintiff, the court concludes that plaintiff's counsel devoted approximately 533.9 hours toward plaintiff's remand motions.[11] The lodestar will be accordingly reduced.

[7] Defendants argue that opposing counsel's requested hourly fee of $165.00 exceeds by $40.00 rates normally charged in the Fergus Falls, Minnesota area by attorneys of similar experience and skill.[12] Plaintiff

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[11] In particular, the hours bill to plaintiff in this regard include the following: Luther -- 89.9 hours; associate attorney Kristine I. Legler Kaplan -- 90.3 hours; law clerk -- 341 hours; and legal assistant -- 12.7 hours.

[12] Defendants do not appear to challenge the rates requested for the associate attorney, law clerk, or legal assistant who served on this case.

responds that the reasonableness of attorney William P. Luther's ("Luther") fees should be judged relative to the Minneapolis legal community. Attorney Luther, is a former federal court of appeals law clerk, is a partner in the Minneapolis firm of Luther, Ballenthin & Carruthers and has over twenty years experience in the practice of law. This case required significant time and presented several challenging substantive issues. Even Assuming, *arguendo*, that Fergus Falls is the appropriate "community" for

determining the market rate,[13] defendants offer no evidence that attorneys of Luther's caliber performing work of this type would receive $125.00 rather than $165 per hour. *See McDonald v. Armontrout*, 860 F.2d 1456, 1459-60 (8th Cir. 1988). The court thus finds no reason to

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[13] Generally, the reasonableness of an attorney's hourly rate is governed by rates in the " 'locality where the case is heard' * * * unless out of town counsel brings to the case unavailable necessary skill and expertise." *Corbett v. Wild West Enterprises*, 713 F.Supp. 1360, 1364 (D.Nev. 1989), *citing, Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760 (7th Cir. 1982), *cert denied*, 461 U.S. 956, 103 S.Ct. 2428, 77 L.Ed.2d 1315 (1983). Here, a significant portion of the litigation was heard in St. Paul as well as Fergus Falls. Further, plaintiff represents that it would have been difficult to obtain conflict-free representation in Fergus Falls.

reduce Luther's requested hourly rate.

Based upon the foregoing, the court arrives at the following:

William P. Luther			
686.5 hours	x $165	=	$113,272.50
Kristine Kaplan			
388.4 hours	x $ 80	=	31,072.00
Law clerk			
112.2 hours	x $ 50	=	5,610.00
Legal assistant			
58.0 hours	x $ 45	=	2,610.00
			$152,564.50

[8] Plaintiff seeks a multiplier of at least fifty percent on his fee request. The fee applicant bears the burden of proving that such an adjustment is necessary. *Blum v. Stenson*, 465 U.S. 886, 898, 104 S.Ct. 1541, 1548, 79 L.Ed. 2d 891 (1984). Other than conclusory statements, plaintiff offers no support for an upward adjustment in the fee award. Further,

the court has considered the twelve criteria set forth in *Hensley*, 461 U.S. at 430, 103 S.Ct. at 1937, n. 3, and concludes that none of the factors justifies an upward adjustment in the fee award. The time spent by plaintiff's counsel, reduced by the number of hours devoted to plaintiff's unsuccessful remand motions, and the hourly rates set forth above reflect an appropriate basis for the fee award.

[9] Plaintiff contends he is entitled to recover $22,212.32 in costs associated with the prosecution of his case. Defendant argues that many of the costs sought by plaintiff are not recoverable. The parties have cited no authority, and the court has found

none, addressing the types of costs which may be recovered under Minn.Stat. §181.935(a). Both parties rely upon *International Woodworkers of America, AFL-CIA v. Donovan*, 792 F.2d 762 (9th Cir. 1986), which recognizes that fee statutes generally provide only for the recovery of "costs that are ordinarily billed to a client." *Id*, 792 F.2d at 767; *see United States v. Boeing Company, Inc.*, 747 F.Supp. 319, 323 (E.D.Va. 1990)(key question in considering what is proper under fee shifting statutes is what would normally be billed to the client, *citing Missouri v. Jenkins* 491 U.S. 274, 109 S.Ct. 2463, 2470-72, 105 L.Ed.2d 229(1989). Such costs normally include, for example, travel

for attorneys, postage, telephone costs, and expert witness fees. *International Woodworkers*, 792 F.2d at 767. Here, plaintiff seeks to recover $9,148.86 in costs directly incurred by he and his wife. Plaintiff has cited no authority, and the court has found none, holding that expenses incurred directly by a party (as opposed to the party's attorney) may be recovered. *See Sapanajin v. Gunter*, 857 F.2d 463, 465 (8th Cir. 1988)("Reasonable expenses of litigation *incurred by counsel* on the prevailing side can be awarded as part of the fees due under Section 1988." (emphasis supplied)). The court will subtract these from plaintiff's request for costs.

[10] The court also finds it appropriate to deduct from plaintiff's request those costs incurred in the prosecution of plaintiff's remand motions. As noted earlier, these motions proved unsuccessful and were entirely distinct from plaintiff's substantive claims. Unfortunately, the court has no accurate means to assess precisely which costs were incurred solely for the purpose of prosecuting the remand motions. Earlier, the court reduced plaintiff's fee request from $193,322.75 to $152,564.50, a reduction of approximately 21.1 percent. The court finds this percentage relevant in determining a suitable reduction from plaintiff's cost request. While this

method may appear somewhat arbitrary, other courts have reduced claims for fees and costs by a percentage rather than agonizing over incalculable details. *See, e.g. Daggett v. Kimmelman*, 811 F.2d 793 797-98 (3rd Cir. 1987). Plaintiff's request for costs will also be reduced 21.1 percent.

Conclusion

Based upon all the files, briefs, and arguments of counsel,

IT IS ORDERED that:

1. Defendants Home Owners Savings Bank, F.S.B., Knutson Mortgage Corporation, Home Owners Federal Savings and Loan Association, and M. Gene Donley are liable to plaintiff in the sum of $152,564.50 as for

attorneys' fees.

2. Defendants Home Owners Savings Bank, F.S.B., Knutson Mortgage Corporation, Home Owners Federal Savings and Loan Association, and M. Gene Donley are liable to plaintiff in the sum of $10,307.07 as for costs.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Peter R. PIEKARSKI, Plaintiff

v.

HOME OWNERS SAVINGS BANK, F.S.B., f/k/a Western Minnesota Federal Savings and Loan Association f/k/a Western Minnesota Savings and Loan Association, f/k/a Fergus Falls Savings and Loan Association; Knutson Mortgage Corporation, a Delaware corporation; Home Owners Federal Savings and Loan Association, a federally chartered saings and loan association; and M. Gene Donley, Defendants.

Civ. No. 4-90-661

United States District Court,
D. Minnesota,
Fourth Division.

Dec. 6, 1990.

Former bank employee brought action against bank, bank's president, and bank's parent corporation for wrongful termination. After liability was determined in state court, action was removed to federal court for

determination of damages. The District Court, Devitt, J., held that: (1) former bank employee's acceptance of less renumerative employment as real estate sales person did not limit his right to receive back pay; (2) employee's right to receive compensatory damages did not terminate as of date Resolution Trust Corporation became conservator of bank's parent: (3) evidence supported back pay award of $120,000; (4) evidence supported front pay award of $35,000; and (5) evidence supported assessment of $25,000 in punitive damages against bank's president.

Judgment accordingly.

1. Master and Servant 30(6.30)

Evidence that bank employee was

paid less than other employees because of his bank president's animosity arising from employee's alleged refusal to commit perjury and engage in other improper conduct was sufficient to establish that employee suffered compensable loss of wage and career opportunity due to impermissible retaliation.

2. Master and Servant 42(2)

Former bank employee's acceptance of less renumerative employment as real estate sales person did not limit his right to receive back pay in action against bank for retaliatory wage discrimination, where lack of comparable job opportunities in community, rather than employee's personal desire to leave banking

field, caused employee to accept employment as real estate sales person.

3. **Master and Servant 41(1)**

In bank employee's action for retaliatory wage discrimination and discharge, employee's back pay award was not limited to one year's salary, where employment contract was not limited to one year, and employee's claims were not limited to breach of contract.

4. **Master and Servant 41(1)**

In former bank employee's action for retaliatory wage discrimination and discharge, employee's right to receive compensatory damages did not terminate as of date Resolution Trust Corporation (RTC) became conservator

of bank's parent, absent evidence that employee's contract would have been terminated at time of takeover.

5. Master and Servant 41(6)

In former bank employee's action for retaliatory wage discrimination and discharge, evidence concerning employee's salary as bank officer at termination and salary of other bank officers who remained employed supported award of $120,000 for adjusted past wage and fringe benefit loss.

6. Master and Servant 41(1)

District court may award front pay in lieu of reinstatement as equitable remedy in retaliatory discharge action.

7. Master and Servant 47

In former bank employee's action for retaliatory wage discrimination and discharge, reinstatement would not be granted as equitable remedy, where animosity existed between employee and his former superiors and coemployees independent of matters giving rise to action.

8. Master and Servant 41(1)

Bank employee who was victim of retaliatory wage discrimination and discharge was entitled to award of $35,000 in front pay; although employee was not currently receiving salary or fringe benefits comparable to those he would have been receiving had he not been improperly discharged, he was employed as real estate agent,

and was likely to earn salary comparable to that which he would have been earning in his former occupation in a few years.

9. Master and Servant 41(5)

Findings that bank president intentionally interfered with employee's employment contract for purpose of injuring employee or advancing president's own interest, and that president's actions were contrary to interests of bank justified award of punitive damages in employee's action for retaliatory wage discrimination and discharge.

10. Damages 87(1)

Generally, award of punitive damages is designed to punish wrongdoer for extraordinary misconduct

and to warn others against similar unlawful behavior.

11. Master and Servant 41(5)

Assessment of $25,000 in punitive damages against bank's president was appropriate in former employee's action for retaliatory wage discrimination and discharge; president's misconduct continued over approximately five years, culminating in employee's discharge, and president refused to acknowledge any wrongdoing. M.S.A. § 549.20, subd. 3.

12. Damages 30, 49.10

Damages for loss of reputation and emotional distress were recoverable on former bank employee's claim for tortious interference with employment contract.

13. Damages 192
Master and Servant 41(2)

Evidence was insufficient to support award of damages for emotional distress and loss of reputation in employee's action for retaliatory wage discrimination and discharge; evidence indicated that employee's termination caused him to suffer from stress and that word of his firing spread quickly through community.

14. Master and Servant 46

Under Minnesota law, award of costs and attorney fees was within district court's discretion in action for retaliatory wage discrimination and discharge. M.S.A. § 181.935(a).

William P. Luther, Luther, Ballenthin & Carruthers, Minneapolis, Minn., for plaintiff.

Charles A. Mays and Lawrence P. Schaefer, Leonard, Street and Deinard, Minneapolis, Minn. for defendants.

FINDINGS & ORDER ON DAMAGES

DEVITT, District Judge.

Introduction

This wrongful termination from employment action, the liability phase of which was decided by the Minnesota State District Court[1], is now before this court for a determination of

[1] The Hon. Harlan L. Nelson, Seventh Judicial Districit -- Otter Tail County, presiding.

damages.[2]

Background

Plaintiff Peter R. Piekarski seeks to recover approximately $800,000 in damages arising out of defendants' wrongful termination of his employment on January 26, 1988. Prior to being

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[2] The procedural history of this case is somewhat unusual. Plaintiff originally filed this action in state district court in Otter Tail County, Minnesota. At the conclusion of the liability phase of trial, the case was removed to the United States District Court for the District of Minnesota, then remanded to Otter Tail County. Pursuant to 12 U.S.C. § 1441a(l)(1), 3, the action was next removed to the United States District Court for the District of Columbia. For the convenience of parties and witnesses and in the interests of justice, the case was then transferred, under 28 U.S.C. § 1404(a), to the United States District Court for the District of Minnesota.

fired, plaintiff served as vice-president in charge of mortgage lending at Home Owners Savings Bank in Fergus Falls, Minnesota.

Plaintiff filed his initial complaint in this action in November, 1988. Trial of the liability issues commenced November 28, 1989 before an advisory jury. The jury returned a verdict on December 7, 1989, finding defendants liable on plaintiff's breach of contract, retaliatory discharge, and intentional interference with contract claims. The state district court issued findings of fact and conclusion of law on February 20, 1990, adopting the advisory jury's verdict in all respects and providing a thoughtful

and detailed explanation of the basis for its judgment.[3] In particular, the state district court's conclusions of law read:

> The defendants are liable to the plaintiff and the plaintiff is entitled to receive:
>
> A. From defendants Home Owners, Knutson and Home Owners of Boston, such compensatory damages and such other relief as may be authorized by law.
>
> B. From defendant Donley, such compensatory damages, punitive damages and such other relief as may be authorized by law.

This court is governed by the state court's findings of fact for the

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[3] State District Judge Nelson afforded this court helpful insight into this case through his extensive 29 page memorandum. It was of substantial assistance in embellishing the cold record and giving the court an understanding of the case not otherwise obtainable.

purpose of determining damages and attaches a copy hereto as Appendix A. Consequently, this court need not provide a specific description of the facts giving rise to liability, and may instead focus on those facts and arguments particularly relevant to the damages issues.

Discussion

Plaintiff seeks to recover the following amounts:

Wage and fringe benefit loss	$614,290
Loss of opportunity, reputation, and mental distress . . .	100,000
Punitive damages (against Donley) . . .	100,000

Defendants contend that plaintiff is, at most, entitled to recover $60,487

for his wage and fringe benefit loss. Defendants further argue that plaintiff is not entitled to receive any award for loss of reputation or mental distress or punitive damages.

The court first seeks to determine the time frame within which plaintiff suffered a compensable loss of wages and fringe benefits. Plaintiff argues that he began suffering wage discrimination in 1984 and that he will never be able to earn a living comparable to that which he could have earned had he remained in defendant's employ. Thus, plaintiff seeks to recover for the prospective loss of wages through the year 2012, when plaintiff would reach age 65, and for the prospective loss of fringe

benefits through 2031, when plaintiff would reach age 84. Defendants dispute plaintiff's allegation of wage discrimination, and contend that plaintiff is entitled to an award of back pay for the period commencing January 26, 1988, the date plaintiff was terminated, and ending no later than April 27, 1990, the date the Resolution Trust Corporation placed Home-Owners -- Boston in conservatorship.

In support of his wage discrimination allegation, plaintiff contrast his annual salary to the salaries to two fellow officers, David

Leabo and Jeffrey Vye:

Year	Piekarski	Leabo	Vye
1975	$11,400		$ 8,400
1976	13,200	$12,000	9,800
1977	15,840	15,840	11,850
1978	17,736	17,736	13,890
1979	20,000	20,000	16,083
1980	22,000	22,000	17,900
1981	24,500	25,000	20,150
1982	25,970	26,500	21,442
1983	27,540	28,920	28,920
1984	28,900	31,500	35,000
1985	30,900	35,400	40,000
1986	32,100	37,800	45,000
1987	33,000	39,900	46,500
1988		43,500	50,100
1989		46,200	52,800

[1] Plaintiff directs the court's attention to 1984 and thereafter and

attributes his relatively lower salary to retaliatory wage discrimination.[4] Specifically, plaintiff claims that defendant Donley avenged plaintiff's refusal to commit perjury and engage in other improper conduct by holding plaintiff's salary behind that of his fellow officers and obstructing plaintiff's career path.[5]

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[4] The above chart appears to show plaintiff's salary first lagging significantly behind that of Leabo and Vye in 1983. According to plaintiff, this disparity is illusory because plaintiff enjoyed the use of a company car, which plaintiff's fellow officers did not, a fringe benefit plaintiff valued at $150.00 per month.

[5] Defendants contend that a two-year statute of limitations bars plaintiff's wage discrimination claim. *See Rice v. Target Stores*, 677 F.Supp. 608, 615-16 (D.Minn. 1988). Assuming, without deciding, that a two-year statute of limitations applies,

Concerning defendant Donley's animosity toward plaintiff, the state district court found:

> During and after the matter with Donley's parents, Donley's attitude toward Piekarski began to change. Piekarski simply could not satisfy Donley. Donley himself testified that after January 1983 he became unhappy with Piekarski's work. No mention was made of Piekarski's work prior to that time. * * * Personnel manager, David Leabo, and Jeffrey Vye also noticed that Donley's personal feelings toward Piekarski were affecting his business judgment.

The evidence does not enable this court to assess with mathematical precision the impact of defendant

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plaintiff's claim for wage discrimination survives under the doctrine of continuing violation. *See Sigurdson v. Isanti County*, 448 N.W.2d 62, 66-67 (Minn. 1989); *Hubbard v. United Press International, Inc.*, 33o N.W.2d 428, 440-41 n. 11 (Minn. 1983).

Donley's contempt for plaintiff upon plaintiff's salary from 1984 through 1987. For example, plaintiff failed to address the possibility that at least a portion of Leabo's salary increases resulted because of greater merit and responsibility vis-a-vis plaintiff. On the other hand, this court respects the state district court's determination that, in general, defendants' treatment of plaintiff "during and after the matter with Donley's parents" was tainted with retaliatory disdain and that decisions respecting plaintiff's wage and career path were tarnished. The court finds that plaintiff suffered a compensable loss of wage and career opportunity due to impermissible

retaliation beginning in 1984.[6]

[2] As noted earlier, plaintiff contends that he will likely suffer loss through the year 2031.

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[6] The exact degree to which plaintiff's salary and career opportunities were damaged is unclear. Thus, any calculation of damages caused by defendants' retaliatory wage discrimination will be imprecise. This, however, cannt serve to deprive plaintiff of reasonable compensation. *See Equal Employment Opportunity Commission v. Kallir, Philips, Ross, Inc.*, 420 F.Supp. 919, 923(S.D.N.Y. 1976); *aff'd.*, 559 F.2d 1203 (2d Cir. 1977); *cert. denied*, 434 U.S. 920, 98 S.Ct. 395, 54 L.Ed.2d 277(1977)(the injurd party is not to be deprived of adequate compensation where damage caused by defendant's conduct escapes precise determination); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562, 51 S.Ct. 248, 250, 75 L.Ed. 544 (1931)("The rule which precludes the recovery of uncertain damages applies to such as are not the certain rsult of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.").

Defendants dispute plaintiff's entitlement to front pay and offer three alternative dates for the conclusion of the damages period. First, defendants argue that plaintiff may recover damages only through April, 1988, when plaintiff became employed as a real estate salesperson and ceased actively searching for employment in the banking industry.

Wrongfully discharged claimants must use reasonable efforts to mitigate their damages." Brooks v. Woodline Motor Freight, Inc., 852 F.2d 1061, 1065 (8th Cir. 1988). In this regard, the law requires "an honest, good faith effort." Id.; citing United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 938 (10th

Cir.1979). Claimants normally mitigate damages by seeking comparable, alternative employment. The law does not require, however, that a claimant move from his home to temper the damage caused by a defendant's conduct. Coleman v. City of Omaha, 714 F.2d 804, 808 (8th Cir. 1983). Once a claimant accepts new employment, his right to recover back or front pay does not necessarily terminate. See McIntosh v. Jones Truck Lines, Inc., 767 F.2d 433, 435 (8th Cir. 1985); State by Johnson v. Porter Farms, Inc., 382 N.W.2d 543, 550-51 (Minn.Ct.App. 1986). A claimant's right to back or front pay terminates only if he (1) accepts employment in a different field (2)

with the intention of voluntarily abandoning the pursuit of employment in the career field from which he was wrongfully terminated. Id., Hanna v.American Motors Corp., 724 F.2d 1300, 1308 (7th Cir. 1984); cert. denied, 467 U.S. 1241, 104 S.Ct. 3512, 82 L.Ed.2d 821 (1984); Miller v. Marsh, 766 F.2d 490, 492-93 (11th Cir. 1985).

Here, the evidence shows that plaintiff adequately minimized his damages and that plaintiff did not voluntarily enter the real estate sales field in April, 1988 with the intention of abandoning employment in the banking industry. Within three months of being discharged by defendants, the plaintiff visited the

Fergus Falls Job Service office, placed applications and resumes with four businesses, personally contacted two other businesses, and discussed employment opportunities with others in the Fergus Falls community.[7] These inquiries led to a real estate sales position in April, 1988, which plaintiff still holds today.

Significantly, the court recognizes that Fergus Falls is a small community, and that relatively few career openings in the banking

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[7] Plaintiff entered a concentrated three week course in real estate sale in March, 1987. At that time, plaintiff had no firm intention of entering the real estate field, thinking that such training would prove beneficial regardless of whether he landed in the banking or real estate profession.

industry exist. The court finds that the lack of comparable job opportunities (as well as plaintiff's need for income), and not plaintiff's personal desire to leave the banking field, caused plaintiff to accept immediately less remunerative employment as a real estate salesperson in April, 1988. Plaintiff remains willing and able to return to a comparable position in the banking industry should one arise. The record reveals, however, that plaintiff effectively exhausted his search for a position similar to that which he held at defendant Home Owners, and that continued, vigorous efforts at locating such a position in the Fergus Falls area would prove futile. Thus,

the court finds that plaintiff's right to receive back pay is not limited by his April 18, 1988 employment as a real estate salesperson.

[3] Defendants alternatively contend that the damages period must be limited to either one year, the duration of plaintiff's employment contract with Home Owners-Fergus Falls, or through April 27, 1900, when the Resolution Trust Corporation ("RTC") became conservator over defendant Home Owners-Boston. With respect to defendant's first contention, "[t]he measure of damages for breach of an employment contract is the compensation which an employee who has been wrongfully discharged would have received had the contract been carried

out according to its terms." Gilmore v.Control Data Corporation, 442 N.W.2d 835, 838 (Minn.Ct.App. 1989); citing Zeller v. Prior Lake Public Schools, 108 N.W.2d 602, 606 (1961). Here, however, the state district court did not specifically find that plaintiff's employment contract was limited in duration to one year, focusing instead on the numerous oral and written representations of job permanence directed at plaintiff. Further, plaintiff's claim is not grounded exclusively in contract. The same facts likewise establish that plaintiff was the victim of impermissible retaliatory wage discrimination and discharge. See Merchant v. American Steamship Co.,

860 F.2d 204, 210 (6th Cir. 1988)(a retaliatory discharge claim is not grounded exclusively in contract; hence damages are not limited by contract principles). The court thus rejects defendants' argument that plaintiff's back pay award cannot exceed one year's salary.

[4] On April 27, 1990, the RTC began its appointment as Conservator over Home Owners-Boston. Pursuant to federal regulation, the RTC has the authority to repudiate the employment contracts of officers employed by institutions under conservatorship. 12 C.F.R. §563.39(b)(5); see Rush v. Federal Deposit Insurance Corporation, 747 F.Supp. 575, 577 (N.D.Cal.1990) ("all obligations under employment

contracts between FSLIC insured institution and its employees are terminated by operation of law when the FHLBB determines that the institution is in an unsafe or unsound condition"). Defendants contend that, had plaintiff remained employed at Home Owners, the RTC would have exercised its authority and terminated plaintiff's contract.

The evidence shows that, had plaintiff not been discharged, his future as an officer with Home Owners-Fergus Falls would have become less certain following the RTC's involvement. However, defendants failed to persuade this court that plaintiff's contract likely would have been terminated. Plaintiff's expert,

James Kolveidt, testified that the continuation of plaintiff's former mortgage department position is significant. Further, to date, other officers with Home Owners-Fergus Falls have retained their positions. Thus, this court rejects defendants' argument that plaintiff's right to receive compensatory damages terminates as of April 30, 1988.

[5] In determining an appropriate back pay award, this court has evaluated the markedly different opinions of each expert. The experts' back pay computations are based upon a comparison of plaintiff and officer Leabo's incomes. Plaintiff adopts Leabo's actual income form 1984-89 as plaintiff's potential income had he

remained with Home Owners. On the other hand, defendants' expert relies upon the disparity between plaintiff and Leabo's income from 1983-89 to justify a much smaller potential income calculation for plaintiff. Each of these calculations is somewhat suspect. As noted earlier, plaintiff failed to show that Leabo's higher salary was not, in part, due to greater merit or responsibility vis-a-vis plaintiff, while defendants' calculations fails to consider that a portion of the discrepancy between plaintiff's and Leabo's salaries may be attributed to retaliatory wage discrimination. In any event, the experts' methods and calculations, along with the numerous submissions

and exhibits, provide the court guidance in reaching an equitable judgment. The court concludes that plaintiff's adjusted past wage and fringe loss, to date of trial, including prejudgment interest, is $120,000.00.

[6,7] Plaintiff contends that he is entitled to receive compensation for the future loss of wages and fringe benefits. This court may award front pay in lieu of reinstatement as an equitable remedy. Woodline Motor Freight, 852 F.2d at 1065. However, reinstatement may not be denied simply because of the animosity between plaintiff and defendants engendered by plaintiff's refusal to perjure himself or the prosecution of this lawsuit.

See Taylor v. Teletype Corp., 648 F.2d 1129, 1138-39 (8th Cir.1981), cert. denied, 454 U.S.969, 102 S.Ct. 515, 70 L.Ed.2d 386 (1981); Jones Truck Lines, Inc., 767 F.2d at 435, n.1. The court nonetheless finds reinstatement unwise. It appears to the court that animosity exists between plaintiff and his former superiors and co-employees independent of the matters giving rise to this action.

[8] The court finds a limited award of front pay appropriate. In ascertaining an appropriate award, the court finds that plaintiff is not currently receiving a salary or fringe benefits comparable to those he would be receiving had he not been improperly discharged. It further

appears, based on the present progressive increase of his income, and having in mind the range of income received by real estate agents similarly situated, that within several years plaintiff will likely earn a salary comparable to that which he would be earning at his former occupation. The court concludes that plaintiff's future adjusted loss, reduced to its present value is $35,000.00.

[9] At the conclusion of the liability phase, the state district court found that defendant Donley intentionally interfered with plaintiff's employment contract for the purpose of injuring plaintiff or advancing Donley's own interest. The

court further found Donley's actions contrary to the interests of the Home Owners association, and his conduct demonstrative, by clear and convincing evidence, of a willful indifference to the rights of plaintiff. These findings justify an award of punitive damages.

[10, 11] Generally, an award of punitive damages is designed to punish a wrongdoer for extraordinary misconduct and to warn others against similar unlawful behavior. Melina v. Chaplin, 327 N.W.2d 19, 20 n.1 (Minn. 1982). This court must consider a number of factors in arriving at an appropriate punitive damage award. Minn.Stat. § 549.20, Subd. 3 (1990). Here, Donley's misconduct continued

over approximately five years, culminating in plaintiff's discharge. During the damages phase of trial, it became apparent to this court that defendant Donley steadfastly refuses to acknowledge any whisper of wrongdoing on his part. He has simply declined to accept any responsibility for plaintiff's injuries. With respect to his financial condition, Donley receives an annual salary exceeding $90,000.00 and his net worth is approximately $400,000.00. Finally, an award of punitive damages will fittingly admonish others against similar conduct. In view of the state district court's findings and an analysis of the relevant factors outlines in Minn.Stat. § 549.20, Subd.

3, this court concludes that 425,000.00 in punitive damages shall be assessed against defendant Donley.

[12,13] Plaintiff seeks to recover damages for loss of reputation and emotional distress. These damages appear recoverable as a matter of law under plaintiff's tortious interference claim. Pothoff v. Jefferson Lines, Inc., 363 N.W.2d 771, 777 (Minn.Ct.App. 1985). Plaintiff testified that the retaliatory termination impacted upon his personal life and that of his family in a number of ways. Plaintiff stated that he thought often about the termination and that it caused him much stress. Plaintiff apparently suffered from a rash on his left shin which he

attributed to stress; however, plaintiff's doctor could not identify the cause. Finally, plaintiff testified that word of his firing spread quickly through the Fergus Falls community. The court finds plaintiff's evidence to be insufficient proof of emotional distress and loss of reputation. See Eklund v. Vincent Brass & Aluminum Co., 351 N.W.2d 371, 379 (Minn.Ct.App. 1984); Potthoff, 363 N.W.2d at 777.

[14] Finally, plaintiff seeks to recover his costs and attorneys' fees incurred in the prosecution of this action. Minn.Stat. § 181.935(a) provides:

> In addition to any remedies otherwise provided by law, an employee injured by a violation of section 181.932 may bring a civil

> action to recover any and all damages recoverable at law, *together with costs and disbursements, including reasonable attorneys' fees*, and may receive such injunctive and other equitable relief as determined by the court. (emphasis supplied).

An award of costs and attorneys' fees thus appears within the court's discretion. However, the court will await decision on this matter until hearing further from the parties. *See* Local Rule 6.

Conclusion

Based upon the files, briefs, trial exhibits and testimony, and arguments of counsel,

IT IS ORDERED that:

1. Defendants Home Owners Savings Bank, F.S.B., Knutson Mortgage Corporation, Home Owners Federal

Savings and Loan Association, and M. Gene Donley are liable to plaintiff in the sum of $155,000.00 as for past and future compensatory damages;

2. Defendant M. Gene Donley is liable to plaintiff in the sum of $25,000.00 as for punitive damages.

The court will file an order for judgment consistent with this opinion after ruling on the costs and attorneys' fees issues.

APPENDIX A

State of Minnesota

County of Otter Tail

In District Court

Seventh Judicial District

Peter R. Piekarski, Plaintiff,

vs.

Home Owners Savings Bank, F.S.B.,

f/k/a Western Minnesota Federal Savings and Loan Association; f/k/a Western Minnesota Savings and Loan Association, f/k/a Fergus Falls Savings and Loan Association; Knutson Mortgage Corporation, a Delaware Corporation; Home Owners Federal Savings and Loan Association, a federally chartered savings and loan association, and M. Gene Donley, Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

Case No. C1-89-535

February 20, 1990

The above-entitled matter was called for trial before the undersigned and an advisory jury, commencing on November 28, 1989. At the close of the testimony the matter was submitted to the jury on December 7, 1989, for their decision as to the causes of action set out on the

Special Verdict, the remaining causes of action being left for decision by the Court. The jury having returned its answers to the Special Verdict on December 7, 1989, and the Court having reached its decision as to the remaining causes of action included herein:

NOW THEREFORE, pursuant to the Special Verdict of the jury, and the decision of the Court, the Court makes the following:

FINDINGS OF FACT

I. At the completion of the evidence on the liability issues the jury was asked to make findings regarding three causes of action: Employment Agreement; Retaliatory Discharge; and Intentional Interference with

Contract. The jury returned the following verdict:

1. EMPLOYMENT AGREEMENT:

A. Did the plaintiff's employment agreement include terms that the plaintiff could be terminated only for good cause or unsatisfactory job performance?
YES X NO _

B. Did defendants' termination of plaintiff's employment breach the agreement:
YES X NO _

C. Did plaintiff's employment agreement include terms that he could be terminated only by the Board of Directors.
YES X NO _

D. Did defendants' termination of plaintiff's employment breach the agreement?
YES X NO _

E. Did plaintiff's employment agreement include terms that he could be terminated only following a fair warning?
YES X NO _

F. Did defendants' termination of plaintiff's employment breach the agreement?
YES X NO _

2. RETALIATORY DISCHARGE

A. Did the defendants terminate plaintiff's employment because he was requested to testify at a trial involving defendant Gene Donley's parents?
YES X NO _

B. Did the defendants terminate plaintiff's employment because the plaintiff refused to participate in any activity that he in good faith believed violated any state or federal law or rule or regulation?
YES X NO _

C. Did plaintiff inform his employer of his reason for the refusal?
YES X NO _

D. Has the plaintiff proven that the defendants had no valid business reason for plaintiff's termination?
YES X NO _

E. Did the defendants conduct toward the plaintiff show, by clear and convincing evidence, a willful indifference to the rights of the plaintiff?
YES X NO _

3. INTENTIONAL INTERFERENCE WITH CONTRACT:

A. Did defendant Gene Donley act outside the scope of his employment in terminating the plaintiff?
YES X NO _

B. Was the defendant, Gene Donley, award of the essential terms and conditions of plaintiff's agreement?
YES X NO _

C. Did the defendant, Gene Donley, intentionally interfere with the plaintiff's employment agreement?
YES X NO _

D. In terminating plaintiff's employment, did the defendant Gene Donley, act for the purpose of injuring the plaintiff or advancing his own interests, contrary to the interests of the association?
YES X NO _

E. Did the defendant Gene Donley's conduct toward the plaintiff show, by clear and convincing evidence, a willful indifference to the rights of the plaintiff?
YES X NO _

The Court finds that there was sufficient evidence to support the

finding by the jury and hereby adopts the verdict as the findings of the Court.

II. Having approved and adopted the findings of the jury on the issues submitted to them the Court now makes the following findings regarding the issue of misrepresentation:

A. That defendants' made numerous material misrepresentations of fact to the plaintiff regarding his employment, and did so intentionally, negligently, and with careless disregard for whether they were true or false.

B. That defendant knew that the representations were being made to the plaintiff were false, or made

no effort to ascertain whether they were true or false.

C. That the plaintiff justifiably relied on the representations of the defendants, to the detriment of the plaintiff.

D. That the plaintiff has suffered damages as a result of the misrepresentations made to him by the defendants.

III. Damages. The issues of liability and damages were bifurcated for trial in this case. The liability issues have now been resolved in plaintiff's favor. Plaintiff is therefore entitled to receive:

A. From defendants Home Owners, Knutson and Home Owners of

Boston such compensatory damages and such other relief as may be authorized by law.

B. From defendant Donley such compensatory damages, punitive damages and such other relief as may be authorized by law.

IV. The attached Memorandum is hereby incorporated herein as though fully set forth in these findings.

CONCLUSIONS OF LAW

The defendants are liable to the plaintiff and the plaintiff is entitled to receive:

A. From defendants Home Owners, Knutson and Home Owners of Boston, such compensatory damages and such other relief as may be authorized by law.

B. From defendant Donley, such compensatory damages, punitive damages and such other relief as may be authorized by law.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 20th day of February, 1990.

/s/ Harlan L. Nelson
Harlan L. Nelson
Judge of District Court

MEMORANDUM

There are several parties involved in this lawsuit. The plaintiff is Peter R. Piekarski, hereafter referred to as Piekarski. The defendants are Home Owners Savings Bank of Fergus Falls, the former employer of Piekarski, which, during the course of is existence has also used the names Western Minnesota Federal Savings and Loan Association, Western Minnesota

Savings and Loan Association, and Fergus Falls Savings and loan Association, all of which are collectively referred to herein as Home Owners; M. Gene Donley, hereafter referred to as Donley, the president of Home Owners at the time of Piekarski's termination of employment; Home Owners Federal Savings and Loan Association, a federally chartered savings and loan association located in Boston, Massachusetts, hereafter referred to as Home Owners of Boston; and, Knutson Mortgage Corporation, hereafter referred to as Knutson, a Delaware corporation and subsidiary of Home Owners of Boston.

The evidence presented at trial indicates that Piekarski was never

employed directly by Knutson, or by Home Owners of Boston, or by Donley in his individual capacity. Homeowners of Boston, through its subsidiary, Knutson, began the process of acquiring Home Owners in 1987, and completed the acquisition in the first days of January , 1988. Neither Knutson nor Home Owners of Boston suggested or gave any orders for personnel changes at Home Owners. There is no evidence that Knutson or Home Owners of Boston were personally involved in the termination of Piekarski or the decision to terminate. Home Owners was the wholly owned subsidiary of Knutson at the time of Piekarski's termination. Knutson was the wholly owned

subsidiary of Home Owners of Boston.

In determining whether or not the employment contract that existed between Piekarski and Home Owners was for employment of any type other than at will, and whether or not that employment contract contained provisions requiring that there be just cause for termination, this Court is guided by general principles that have previously been adopted by decisions of the Minnesota Supreme Court and the Minnesota Court of Appeals.

Generally, the relationship between an employer and an employee is an at will employment relationship, meaning the relationship is voluntary. Either the employer or employee may terminate

the employment relationship at any time. Absent a contract between the employer and the employee modifying the at will relationship, the employer is free to discharge the employee without cause or other limitation, and the employee is free to leave employment at any time.

The Minnesota Supreme Court, in *Skagerberg v. Blandin Paper Company*, 197 Minn. 291, 266 N.W. 872 (1936), stated the basic at will employment rule as follows:

> "*In the absence of additional express or implied stipulation as to the duration* of the employment or of a good consideration additional to the services contracted to be rendered, a contract for permanent employment, for life employment, for as long as the employee chooses, or for other terms purporting permanent employment,

> is no more than an indefinite general hiring terminable at the will of either party." (emphasis added).

This basic rule was reaffirmed in the case of *Cederstrand v. Lutheran Brotherhood*, 263 Minn. 520, 117 N.W.2d 213 (19620. In that case, the Supreme Court reiterated the employment at will rule in these terms:

> "The usual employer-employee relationship is terminable at the will of either; the employer can sumarily dismiss the employee, the employee is under no obligation to remain at the job. A hiring for an indefinite period is terminable at will. *Unless plaintiff can establish that she was to be dismissed only for cause by proving a contract to that effect, her employment could be terminated at any time and without cause.* (emphasis added).

In *Pine River State bank v. Metille*, 333 N.W.2d 622 (Minn. 1983),

the Minnesota Supreme Court recognized an important exception to the traditional at will employment rule. In *Pine River*, the Court held that there may be a unilateral employment agreement established, if the plaintiff in the action could establish four essential elements. One, an offer to create employment on terms that are definite in form. Two, the offer has bee communicated to the employee. Three, the employee has accepted the offer, and four, the employee is furnished adequate consideration.

In determining whether or not the relationship between Piekarski and Home Owners was anything other than at will, the issue was submitted to an

advisory jury,which was to determine the credibility and the believability of the witnesses, and to resolve the disputed issues of fact.

In answer to question 1A, "Did the plaintiff's employment agreement include terms that the plaintiff could be terminated only for good cause or unsatisfactory job performance?", the jury found there was an employment contract which did contain provisions that Piekarski's employment could be terminated only for good cause or unsatisfactory job performance.

The evidence in this case is undisputed that Piekarski and Home Owners entered into an employment agreement, whereby Piekarski commenced work at Home Owners on March 1, 1973

and continued in that employment until the date of his termination on January 26, 1988.

The parties, however, dispute the terms and conditions of that employment contract. Piekarski contends that the employment contract provided that he could be terminated only for just cause or unsatisfactory job performance following a fair warning and by action of the Board of Directors. The defendants contend that the employment relationship was an employment at will and could be terminated at any time, without cause and without reason. The evidence in this regard was vigorously contested and disputed. The evidence was disputed by Piekarski's witnesses

claiming a contract with specific terms requiring termination for just cause or unsatisfactory job performance, following a fair warning and action by the Board of Directors, and the defendants' witnesses claiming that the employment was at will. In addition to these disputes the evidence was often conflicting and contradictory with a witness saying one thing on direct examination and the opposite thing on cross examinaion. David Leabo, the vice president and controller, a well as personnel manager of Home Owners, indicated that all empoyment was definitely at will. However, he further testified that it was the practice and policy of the association

that termination would be only after remedial measures were first adopted, implemented and found to be unsuccessful, and that termination of employment was the last alternative. Another example of disputed facts is the following questions and answer that was propounded to Mr. Robert Bigwood, the chairman of the Board of Directors of Home Owners:

> Q: Has the bank, ever, to your knowledge, made it a policy or practice to retain officers as employees, as long as they perform their job satisfactorily?
>
> A: No, not as setting out a policy. I think normally that is the result. *If people perform their job satisfactorily they are going to have continued employment*. (emphasis added).

The jury impaneled in this case had an opportunity to listen to the testimony of all the witnesses and to

review all of the exhibits entered into evidence. They also had the opportunity to resolve all factual disputes. In affirming or disaffirming the findings of the jury, this Court must review all of the evidence and determine whether or not Piekarski has proven some "additional express or implied stipulation as to the duration of his employment." *Skagerberg*, supra. The Court must also determine whether Piekarski can establish that he "was to be dismissed only for cause by proving a contract to that affect." *Cederstrand*, supra. Finally, it must be determined that there was no offer with definite terms, communicated to Piekarski, who

accepted the offer, and furnished furnished adequate consideration. *Pine River*, supra.

The defendants' claim that the employment contract was merely an at will agreement is inconsistent with the findings of the jury. This Court finds there is ample evidence to support the jury verdict and hereby adopts their findings.

I. EMPLOYMENT AGREEMENT -- Special Verdict Questions 1A, 1C, 1F

In determining whether or not the employment agreement between Piekarski and Home Owners was an at will contract as proposed by the defendants, or an employment contract providing for termination only for just cause or unsatisfactory job performance

following fair warning and by action of the Board of Directors, as advocated by Piekarski, this Court, after reviewing a number of factors agrees, adopts and affirms the decision by the jury in this case. A review of fourteen factors considered by this Court in reaching this decision follows.

1) PROBATION. Piekarski, at the time of his initial employment, was placed on a nine month probationary period. All of the other officers likewise, were hired on a probationary period. The more recently employed officers were placed on a shorter period of probation. Plaintiff's Exhibit 102. However, all officers were hired with some period of

probation, followed by what Piekarski testified was to be "job permanence". The hiring of a person on probation followed by "job permanence" is a factor tending to show an employment agreement that is something other than at will. If an employee is hired strictly as an at will employee, the employee may be removed at any time without cause or reason. It is unnecessary to place an employee on a probationary period if he is strictly an at will employee. The hiring of the officers of Home Owners on a probationary period is a factor which is inconsistent with the position of the defendants,and is a factor that would be consistent with Piekarski's position. However this factor along

certainly is not conclusive as to the employment arrangement between the parties.

2) ANNUAL APPOINTMENT OF OFFICERS. The officers of Home Owners were appointed annually for one year terms by the Board of Directors. Plaintiff's Exhibit 29. The appointment of officers for a one year term is a factor that would be inconsistent wit the at will employment agreement argued by defendants and would be consistent with Piekarski's position that is employment was something other than at will. Here again, this factor standing along is not conclusive as to the employment arrangement between the parties.

3) ANNUAL SALARY. Testimony presented by both sides established that the officers had their salaries set on an annual basis. Each year they received notice from either the president or the chief executive officer that their salary for the coming year has been set at a certain amount. Plaintiff's Exhibits 4-6, 11, 28A, 28C, 28D, 86, 95, 106, 107. An at will employee is normally paid on a per hour basis, or, at most a per week basis. Setting a salary for the entire year is a factor that certainly could be considered by the jury, and is being considered by this Court, as inconsistent with an at will agreement, and more consistent with Piekarski's contentions.

4) ANNUAL REVIEWS. For many years, each of the officers of Home Owners received a formal annual review near the time of the setting of salaries and reappointment of officers for the forthcoming year. Plaintiff's Exhibits 31-33. At will employees are normally not provided an annual review, since their employment can be terminated at any time without cause and without reason. Annual review of the officers is a factor that would be inconsistent with the defendants' contention that this was strictly an at will employment agreement, and would be more consistent with Piekarski's position.

5) JOB SECURITY REPRESENTATIONS. At the time of the annual setting of

salaries and reappointment of officers, each officer received a letter from either the president or the chief executive officer. Many of the letters indicated to the officers that their raises and benefits were not what the officers may have expected. Plaintiff's Exhibits 11, 95, 107. However, in exchange for these somewhat lower salaries, they were assured that defendant's goal for them was "job security." Plaintiff's Exhibits 11, 95, 107. The offering of 'job security" in exchange for lower salaries is a factor that would be inconsistent with an at will employee, and consistent with an employee whose job required cause for termination, as Piekarski contends.

6) BUILDING A FILE. Donley had personnel files on a number of the officers of Home Owners, including Piekarski. Plaintiff's Exhibits 34-45, 47, 50, 87; Defendant's Exhibits 2, 5. These acts by management of building files on employees are certainly factors inconsistent with the management's position that they may terminate an employee without cause at any time. Building a file, as in this case, where numerous acts of alleged misconduct were documented and placed i the file, is a factor that would indicate an intent on the part of management that termination required good cause. The building of a file is a factor more consistent with Piekarski's contention that

termination could be only for cause. The only reason advocated by Home Owners for building these files was in order to establish cause, therefore indicating their belief that these employment contacts did require cause for their termination. Although this factor is not conclusive, it certainly is an important factor, tending to show that there was an employment agreement that required cause prior to termination.

7) PAST PRACTICES OF TERMINATION FOR CAUSE. Piekarski understood that as long as he performed satisfactorily he would continue as an officer of Home Owners. However, he also realized that Home Owners had the right to terminate him, under certain

guidelines, if he was not performing adequately. Piekarski contends that the guidelines require cause for termination. There was testimony that two other officers of Home Owners had their employment terminated, namely John Morgan and Gary Froehlich. Both of these terminated employees had files compiled showing cause for their termination. Although John Morgan was not warned of his termination, certainly the acts he committed would justify an immediate termination of his employment, even if the company had a policy of providing fair warning prior to termination. Mr. Morgan sent a derogatory racial remark over the inter-office communication system between each of the numerous branches

of Home Owners on Martin Luther King Day. Such conduct by any employee would be grounds for immediate termination. However, Mr. Morgan's employment was not terminated at that time. According to David Leabo, the vice president and personnel manager of Home Owners, Mr. Morgan was not terminated until after he intentionally destroyed or damaged a typewriter belonging to Home Owner's Pelican Rapids office. This was an act that would have amounted to criminal damage to Home Owner's property. The termination of Gary Froehlich was documented by a writing stating his deficiencies. Plaintiff's Exhibit 62. He was given a year in which to correct those

deficiencies which had been documented and acknowledged, and only after they went uncorrected for that period of time, was he terminated. It appears that the past practice of Home Owners was to provide cause for the termination of any officers. Certainly this past practice is an indication of what Home Owners intended the agreement amongst all officers to be, and that practice is inconsistent with their position of an at will employment agreement. It appears to be more consistent with Piekarski's position.

8) PAST PRACTICE OF FAIR WARNING. Terminated officer Gary Froehlich, was given an adequate one year warning, although John Morgan was not warned.

The circumstances surrounding John Morgan's termination would require an immediate termination, even without any kind of a warning. Therefore, the past practice of Home Owners regarding deficient conduct had been to give fair warning. Certainly, this past practice of fair warning is a showing of intent on their part to provide fair warning before the termination of any officer. This practice is inconsistent with employment at will and consistent with Piekarski's position.

9) ORAL AGREEMENT AT TIME OF HIRING. Although the evidence was disputed as to the terms and conditions of Piekarski's hiring, Piekarski testified that he was assured

of job permanence. The president of Home Owners at the time of Piekarski's hiring was Charles Peterson, who testified that he did not make those statements. The credibility and the believability of all witnesses was a factor that was to be considered by the jury. Their verdict indicated that they accepted the testimony of Piekarski. It would appear then, that Piekarski's testimony provides another factor in determining whether or not this a an employment at will agreement or something beyond that. Piekarski indicated that he was told by the hiring officer that after having successfully passed the probationary period, he would have "job permanence". Also, Charles Peterson

gave the impression that if he successfully passed the probationary period, "there was a definite future for an officer. . . " at Home Owners. the offering of "job permanence" and oral representations of a "future" certainly are inconsistent with an at will employment agreement, but are consistent with Piekarski's contentions that the employment contract provided only for cause termination.

10) WRITTEN OFFER BY PRESIDENT. Piekarski was hired by Charles Peterson, who, as bank president, sent Piekarski a written offer of employment. The letter offering the position of Mortgage Loan Officer indicated that the position had a

"future". Plaintiff's Exhibit 3. When the president of the bank indicates to an employee that the position that he has been offered has a "future," that statement is inconsistent with an employment at will agreement where employment is uncertain. However, a position with a "future" is consistent with Piekarski's position that he was more than an employee at will.

11) ORAL TESTIMONY OF PERSONNEL MANAGER. David Leabo, the vice president and controller, as well as the personnel manger of Home Owners, stated that unless there is cause to terminate, an employee will keep his position. Also, if the job itself was eliminated a person could lose their

job in that manner. Therefore, if the job was not eliminated it took cause to terminate. However, Piekarski's position was not eliminated, as Stephen Kopkie was promoted to that position upon his termination. Furthermore, there was testimony by Leabo that Piekarski's department was productive. Also, Leabo, as one of the top three officers, was in charge of all activities relating to human resources at Home Owners. Plaintiff's Exhibit 102. This included discipline and termination of employees. The discipline and termination process involved trying to correct the particular situation at the time of occurrence by talking things out with the employee. It required fairness

and a warning, with termination being the last straw in the process. he practices as annunciated by the head of personnel certainly show a policy of the part of Home Owners to require cause for termination. The practices as set forth by the personnel director are inconsistent with an at will employment agreement and consistent with Piekarski's contentions.

12) ORAL TESTIMONY OF CHAIRMAN OF THE BOARD. Mr. Robert Bigwood was the chairman of the Board of Directors at Home Owners during a portion of the time Piekarski was employed there. In his testimony Bigwood was asked if Home Owners "ever to his knowledge, made it a policy or practice to retain officers as employees, as long

as they perform their job satisfactorily?" To this he stated that "I think normally, that is the result. If people perform their job satisfactorily they are going to have continued employment" at the bank. When the Chairman of the Board indicates that it is the practice of Home Owners to provide continued employment as long as there is satisfactory performance, this is strong evidence that Home Owners had a policy relating to their employment, which provided for termination only for cause. this is inconsistent with an employment at will agreement, but is consistent with Piekarski's position.

13) APPLICATION TO SELL ASSOCIATION TO KNUTSON MORTGAGE. The Board of Directors made an application to sell Home Owners to Knutson, and indicated in the application that there were no plans to change the structure or functioning of the management officials of the bank due to the acquisition by Knutson. Plaintiff's Exhibit 80. It further indicated that all officers of the bank prior to the acquisition would continue in the same capacities after the acquisition. Written statements that all officers would keep their positions in this instance is inconsistent with an employment at will agreement in which there are no assurances of continued employment. This assurance shows an

intent by Home Owners that Piekarski would have continued employment at the bank and not be terminated without cause.

14) BYLAWS. The bylaws of Home Owners have a provision regarding the election of officers on an annual basis, and further provide that "[a]ny officer may be removed by the board of directors whenever in its judgment the best interests of the association will be served thereby, but such removal, other than for cause, shall be without prejudice to the contractual rights, if any, of the person so removed." Plaintiff's Exhibit 29. This is strong evidence indicating that Piekarski's employment contract did provide that termination would be only for cause.

Although the bylaws that were introduced in evidence were dated 1988, all the parties through out trial assumed that those bylaws had been in effect, and this Court is likewise assuming the copy that was introduced in evidence was simply a copy of what had been in effect throughout the entire employment period of Piekarski. When the bylaws of Home Owners speak of termination for cause, certainly this is a provision that Home Owners is bound by, and along with all of the other factors, shows that there was in fact, an employment agreement requiring termination for cause. the provisions in the bylaws are inconsistent with an employment at will agreement, and

appear to be consistent with the Piekarski's position.

Piekarski has claimed that he could be terminated only for just cause or unsatisfactory job performance following fair warning and action by the Board of Directors. Home Owners contends that there was merely an employment at will agreement by which they could terminate Piekarski at any time and without cause. The *Skageberg* case indicated that employment at will was the rule "in the absence of additional express or implied stipulation as to the duration of the employment . . . " The *Cederstrand* case established that cause was not necessary to termination "unless plaintiff can establish that

(s)he was to be dismissed only for cause by proving a contract to that affect . . . " The test set forth in the *Pine River* case requires the plaintiff in an action to establish that there was an offer in definite terms, communicated to the employee, who accepted the offer, followed by the employee furnishing adequate consideration. Evidence produced b Piekarski establishes that there were additional terms express or implied stipulations as to the duration of his employment,and that he had a contract calling for termination only for cause. The evidence also establishes that there was an offer indefinite terms, communicated to Piekarski, who accepted, and he then furnished

adequate consideration.

Piekarski was placed on a nine month probationary period at the time he was hired, and was told by Charles Peterson that the position had a future. Upon completion of the probationary period he was promised job permanence by Charles Peterson. Also, following his probationary period there were annual salaries, annual reviews of job performance and the annual election of officers by the Board of Directors. Piekarski and other officers received a relatively small raise, but were offered job security in place of a larger increases.

In addition to these factors, Piekarski produced evidence that he

could be terminated only for just cause or unsatisfactory job performance. Donley built a file showing purported acts of misconduct by Piekarski, indicating a need to show cause for termination. It was also established that other officers were terminated only for cause, and that it was a practice to give a warning prior to termination. The personnel manager, who was one of the top three officers at Home Owners, and a former chairman of the Board of Directors both testified that persons who performed their jobs satisfactorily would continue their employment at Home Owners. Piekarski and the other officers were also assured that following the acquisition

by Knutson, they would all remain in their same capacities. Finally, the bylaws of Home Owners refer to "for cause" in reference to removal of officers.

The jury found these factors sufficient to establish that Piekarski's employment was terminated in violation of his employment agreement. It is the determination of this Court that the findings of the jury are supported by the evidence present.

II. BREACH OF CONTRACT -- Special Verdict Questions 1B, 1D 1E

The jury determined that Home Owners had breached the provisions of the employment contract requiring that Piekarski be terminated only for just cause or unsatisfactory job

performance following fair warning and by action of the Board o Directors. In reviewing the evidence, this Court finds that there was adequate evidence to support that verdict, and hereby adopts the decision of the jury which found that the contract provison were breached by Home Owners.

Piekarski, at the time of his termination, was vice president in charge of mortgage lending at Home Owners. Further testimony established that the mortgage lending department of Home Owners was a successful operation during the period of time that Piekarski was managing the department. Also, his department was financially solvent and made money for the association.

Although Home Owners did not acknowledge that they required cause for Piekarski's termination, they nevertheless presented evidence during the course of the trial intending to justify the termination on a cause basis. Plaintiff's Exhibits 34-45, 47, 50. The jury disagreed with that contention, and this Court finds that there is adequate evidence to support the jury's conclusion that Piekarski's termination was without cause.

During the period of time that Piekarski was operating a successful mortgage loan department, testimony of several witnesses established that the management of Home Owners engaged in a course of investments which resulted in the total wipe-out of the net worth

of the association. These investments lost the owners of the association approximately seven million dollars during a period of only three years. The complaints of Piekarski's conduct simply do not justify his termination on a cause basis. The evidence indicates that he performed his job in a satisfactory manner and was one of the few officers that did, in fact operate a department at a profitable level. Other officers were less successful and remain as officers of Home Owners. The termination of Piekarski's employment was a breach of his contract provision requiring good cause, and the termination was without sufficient justifiable reasons.

It is undisputed that there was not adequate or fair warning prior to Piekarski's termination. He was simply called into the office of two of the officers and advised at 10:00 a.m. that he was terminated, and that he should leave the premises immmediately. Piekarski was, however, granted permission to remain at his desk throughout the remainder of the day, but then was directed not to return. Certainly, he was given no warning of his termination, which was in violation of the contract requiring termination only upon fair warning.

Donley instructed Leabo and Vye to think about which officers should go forward under the new ownership of the bank. Nothing in the evidence

indicates that the Board of Directors took any action in this regard. The Board's minutes do not reflect Piekarski's termination or that the Board's approval was sought or given. The minutes merely refer to Board members elected for 1988, including Stephen Kopkie as vice president of mortgage lending, Piekarski's former position. Plaintiff's Exhibit 72. Termination of Piekarski by Donley was in violation of his employment contract and the bylaws of the association, as the Board of Directors took no action in this regard,and was not even aware that this action was taking place.

III. RETALIATORY DISCHARGE

The jury determined that Piekarski's termination resulted from

his being subpoenaed to testify at a trial involving defendant Donley's parents. This finding was based upon a number of factors which, when combined, the jury determined to be sufficient evidence that Piekarski's termination was retaliatory in nature. This Court agrees with the jury and finds that although no single factor may have been determinative, all the evidence together indicates that Piekarski's termination was related to his testifying in the trial involving Donley's parents.

Piekarski was the mortgage loan officer at the bank for nearly ten years prior to the time Jerry and Denise Gerhardson came to Home Owners seeking a loan for the purchase of a

home from Donley's parents. Piekarski eventually became the person in charge of handling their loan application. After the loan process began, Piekarski approached Donley to discuss the matter, at which time Donley suggested and FHA loan. This type of loan would accommodate his parents' desire to receive the entire purchase price in a lump sum, rather than over a number of years. After expressing some concerns to Donley, Piekarski continued to process the loan and discovered that the FHA loan required the septic system to be improved so that it would meet prescribed standards. It also required that an escrow account be set up to pay for the system in an amount equal to one

and one-half times the estimated cost. Piekarski brought this matter to the attention of Donley, who said no escrow would be necessary, as his parents had money on deposit at Home Owners in interest bearing accounts and they did not want to lose the interest. Donley also stated that if Piekarski did not trust his parents, Donley himself would be responsible.

When the septic system problem was discoverd, the Gerhardsons and the Donleys executed an addendum to the purchase agreement, stating that the system had to be improved so as to meet the approval of the Land Resource Use Office. It was the understanding of the parties that any system meeting the requirements of the loan would be

acceptable. However, the Donleys were never satisfied with the estimates for the work and performance never started, so the Gerhardsons got an offer on a drain field system and had the work done. The Donleys refused to pay, claiming the addendum called for a holding tank system and not a drain field system. Donley's parents went to the bank to talk with their son on several occasions, and later produced a copy of the addendum which they claimed showed that they were responsible to pay less for the septic system than the Gerhardsons were seeking. Piekarski knew the addendum had been altered as he had a copy of the doucment, and his secretary had typed the original document.

Piekarski's disagreement with Donley's parents resulted in a call from Donley, in which he stated that Piekarski should not have tried to involve him in his parents' transactions. He twice stated that Piekarski was "treading on thin ice". Piekarski was then called to Donley's office. While there, Donley pounded his finger on the desk and asked Piekarski twice "do you want me to ask for your job?" Piekarski stated that he believed that he should do as he was told regarding Donley's parents, or he would be fired.

When the septic system problems could not be resolved, the Gerhardsons brought a lawsuit against Donley's parents to recover the cost of the

work done on the system. Piekarski was subpoenaed to testify in favor of the Gerhardsons and he informed Donley of his being subpoenaed. When Donley saw the subpoena he gave Piekarski a stern look before turning his back and walking away without saying a word. Based upon prior discussions with Donley concerning this matter, and the reaction of Donley to the subpoena, Piekarski, in good faith, believed that Donley was warning him that he had better not testify against Donley's parents. The jury in the present case found that Piekarski was justified in his belief that Donley wanted him to commit perjury or avoid the subpoena.

During and after the matter with Donley's parents, Donley's attitude toward Piekarski began to change. Piekarski simply could not satisfy Donley. Donley himself testified that after January of 1983 he became unhappy with Piekarski's work. No mention was made of Piekarski's work prior to that time. The escrow problem with Donley's parents began with the loan application in early 1983. There were six exhibits entered into evidence regarding notes in Piekarski's personnel file prior to 1983. Three of these were annual reviews that showed satisfactory ratings, and three of the notes, covering five different dates, were critical of Piekarski's work. There

were eleven more exhibits regarding notes placed into Piekarski's file from 1983 until his termination in January 1988. There were negative comments about him on all of the notes, which covered seventeen different dates. Also, Piekarski was not formally reviewed in 1982-1984, but was reviewed by Donley in January 1985, only a few months after the Gerhardson-Donley trial. Personel manager, David Leabo, and Jeffrey Vye also noticed that Donley's personal feelings toward Piekarski were affecting his business judgment.

Evidence was introduced at trial showing that in the ten years prior to the escrow matter involving Donley's parents, Piekarski's department was

consistently functioning in a productive manner. There were few criticisms directed toward Piekarski or his department during that period. Testimony showed that his department brought profits to Home Owners while other officers, including Donley and David Leabo, had made decisions which had cost the association sizable losses. Piekarski was terminated while these other officers remain employed at Home Owners. In comparison, any problems created by Piekarski seem rather small next to those of some of the other officers at the bank. It was also noted in the testimony that the other employees liked Piekarski, as did the customers. The only person Piekarski

did not seem to get along with was Donley who was known to have had conflicts with other officers as well as Piekarski. All of this evidence seems to support the finding of the jury that Piekarski was discharged by Donley in retaliation for testimony in the trial of Donley's parents.

IV. INTENTIONAL INTERFERENCE WITH CONTRACT

Piekarski claims that Donley intentionally interfered with the contractual relationship between himself and Home Owners. The jury concluded that Piekarski was correct, and based upon the evidence presented at trial the Court agrees with the jury's determination. Many factors were considered by the jury and the Court in reaching this conclusion.

Piekarski had an employment contract with Home Owners. The jury determined that as president of the bank, Donley was aware that this relationship existed and was aware of the terms and conditions of the employment agreement.

During the course of Piekarski's employment with Home Owners he was involved in a number of disagreements with Donley. Piekarski was wrongly blamed for a letter of criticism sent to the Board of Directors by Nancy Pennings after she quit her employment at Home Owners. Plaintiff's Exhibit 89. Donley also found fault in Piekarski for the troubles encountered with Donley's parents, and for attempts by Piekarski to help Jeffrey

Vye in disagreements with management over vacation time he had earned.

It was obvious to a number of people that Donley did not get along with Piekarski. Piekarski was verbally attacked by Donley in the presence of another employee, Ken Pike, without provocation. This was another example of the animosity Donley felt toward Piekarski.

Donley claims that Piekarski's termination was at the recommendation of Vye and Leabo, but the evidence indicates that Donley was solely responsible for the decision. Vye and Leabo were instructed to review the officers of the bank and decide which ones they should retain after the acquisition by Knutson. They both

testified that Donley also went through part of Piekarski's personnel file with them, pointing out selected notes he had entered in the file. All of the notes they looked at were negative toward Piekarski.

Further evidence of Donley's interference in the contract is seen by his removal of Piekarski for cause when no cause exised. Donley compiled a file on Piekarski intending to establish cause for terminating him. The testimony of several witnesses indicated that many of the notes in the file were vague, undated or dealt with incidents that were minor in nature. Donley then proceeded to terminate Piekarski without seeking any action by the Board of Directors.

This was in violation of the provision in the bylaws which required Board of Directors action for removal of officers.

Donley also failed to give any warning to Piekarski. Donley had Vye and Leabo inform Piekarski of his termination at ten o'clock in the morning on the day he was told to leave. Donley was out of town at the time and instructed the other officers tc take care of the matter so he would not have to go through the stress.

Based upon the testimony and other evidence in this case, it is apparent that Donely, while acting outside the scope if his employment, did intentionally interfere with the employment contract of Píekarski.

Also, he did this with the purpose of advancing his own interests contrary to the best interests of Home Owners, and with willful indifference to the rights of Piekrski or the harm caused to him. Donley was the president of the bank, and as such, was in a position to control the information that went to the Board of Directors. He was able to tell them whatever he wished regarding Piekarski, whether true or false, and the board generally went along with Donley's suggestions. Piekarski was well liked by the customers of the bank. Also, it was the customers who were the owners of the bank at that time. It would be in the best interests of the owners to have an employee who was well liked

and highly experienced such as Piekarski.

Piekarski was not the type of person to keep quiet if he felt management was making a bad decision for the bank. He frequently asked for things that would improve the bank's performance. Evidence established that Donley seldom listened to any of his suggestions. Donley was also the one who negotiated the sale to Knutson and negotiated employment contracts for himself, Vye and Leabo. With nobody to question these moves Donley was able to advance his own interests and salary with little difficulty. It was better for Donley's own well being to get rid of Piekarksi.

V. MISREPRESENTATION

Piekarski was employed by Home Owners for a period of approximately fifteen years. During the course of his employment a number of annual reviews of his job performane were conducted. These reviews, including the final one he received in January of 1987, concluded with satisfactory overall ratings. Plaintiff's Exhibits 31-33. Piekarski also received notice of annual raises by means of letters from the president of the bank, all indicating satisfactory performance. Plaintiff's Exhibits 4-6, 28A, 28C, 28D. During this same time period, Donley was compiling information in Piekarski's personnel file purporting to show numerous problems with

Piekarski's job performance. Plaintiff's Exhibits 34-45, 47, 50, 87. Testimony established that most of the items in Piekarski's personnel file were not brought to his attention, while he was aware of the results of his annual reviews. Therefore, based upon the information that Piekarski had available, his job was secure and his performance was satisfactory. However, Donley chose to make that representation to Piekarski rather than discuss the information in his personnel file. Therefore, it appears a though Donley misrepresented to Piekarski, whether intentionally, negligently or recklessly, that his job performance was fine and his position secure.

During his employment at Home Owners, Piekarski served as vice president of mortgage lending and also assistant secretary. At the time of Piekarski's termination, he still held those positions. In the year prior to Piekarski's termination, Knutson was in the process of acquiring Home Owners. Piekarski's testimony, and that of several other officers, established that due to the concerns of many of the officers, Donley on several occasions indicated that he would do everything he could to keep the officers intact after the acquisition. He also indicated in Home Owner's business plan that all of the officers were expected to remain in their same capacities after the

acquisition. Plaintiff's Exhibit 78. It was also represented that Knutson's primary aim was to augment and develop the existing staff at Home Owners. Plaintiff's Exhibit 80. Piekarski was aware of these representations during the final year of his employment. He expected to continue his employment and performed as though it would continue. He relied upon the representations of continued employment and did not begin to seek other employment. To Piekarski's knowledge, he was going to be a part of the organization after the acquisition. The evidence indicated that Donley had already planned to terminate Piekarski, but did nothing to inform him of that intention.

Other evidence produced at trial also shows Donley's intention to terminate Piekarski. In the year prior to the termination, Donley began to bypass Piekarski in dealing with the mortgage loan department. He began going to Stephen Kopkie when matters concerning Piekarski's department had to be discussed. This was done without informing Piekarski, who was the head of the department. Piekarski was also aware that Knutson intended to focus on home loan mortgages after the acquisition, leading him to believe his role at Home Owners would increase. Again, no mention was made to Piekarski that his job was in jeopardy or that he would not be part of the organization when

Knutson completed the acquisition.

At the time of Piekarski's termination he was told that the reason for his dismissal was "corporate restructuring". Plaintiff's Exhibit 30D. However, there is no indication from the evidence produced at trial that any corporate rstructuring occurred. Piekarski's position still exists, Stephen Kopkie was permitted to replace him immediately after he was terminated. Stating that corporate restructuring was the reason for termination was a representation by Donley to Piekarski which was false. This was an intentional misrepresentation on the part of Donley.

Based upon the facts mentioned above as represented to Piekarski, a material misrepresentatin has occurred. Donley either knew these representations were false, or they were negligently made, or were made with careless disregard for the truth. It also appears as though Piekarski justifiably relied on the presentations of Donley and has suffered damages as a result.

Peter R. PIEKARSKI, Plaintiff,

v.

HOME OWNERS SAVINGS BANK, et al., Defendants.

Civ. A. No. 90-1415

United States District Court
District of Columbia

Aug. 3, 1990.

Former bank employee brought state court suit against former employer to recover for wrongful termination. Resolution Trust Corporation was appointed as conservator and was substituted as defendant. Corporation removed case to federal district court in Minnesota. The United States District Court for the District of Minnesota, Devitt, J., remanded case and refused to transfer venue to

District of Columbia. Corporation removed case to District Court for the District of Columbia. The District Court, Thomas F. Hogan, J., held that: (1) Corporation had right to remove case, and (2) Corporation was entitled to transfer of case to federal district court in Minnesota.

Motion to transfer granted.

1. Removal of Cases 44

Resolution Trust Corporation, that was substituted as defendant for former employer, had right to timely remove former employee's wrongful termination case to district court for District of Columbia, regardless of stage of proceedings. Federal Home Loan Bank Act, § 21A(l)(1,3), as amended, 12 U.S.C.A. §1441a(l)(1,3).

2. Removal of Cases 14

Former bank employee's wrongful discharge suit that had been brought in state court could not be removed by Resolution Trust Corporation to federal court in Minnesota after Corporation was substituted as defendant; Corporation did not initiate the suit; wrongful discharge action arose without involvement of Corporation; and suit could only be removed to district court for District of Columbia. Federal Home Loan Bank Act, § 21A(l)(d), as amended 12 U.S.C.A. § 1441a(l)(3).

3. Courts 99(6)

Ruling by federal district court in Minnesota that former bank employee's wrongful termination suit could not be

removed to district court by Resolution Trust Corporation was not law of the case with respect to Corporation's motion to remove case to federal district court for the District of Columbia. Federal Home Loan Bank Act, § 21A(L)(1,3), as amended, 12 U.S.C.A. § 1441a(l)(1,3).

4. Removal of Cases 94

Financial Institution Reform, Recovery and Enforcement Act does not prohibit party from correcting defective removal attempted to a federal district court. Federal Home Loan Bank Act, §21A(l)(1,3), as amended, 12 U.S.C.A. § 1441a(l)(1,3).

5. Removal of Cases 101

Principles of abstention and judicial economy did not entitle former bank

employee to remand of wrongful termination case that had been property removed by Resolution Trust Corporation; court could not remand properly removed case for discretionary reason not authorized by Financial Institutions reform, Recovery, and Enforcement Act. Federal Home Loan Bank Act, §21A(l)(3), as amended, 12 U.S.C.A. §1441a(l)(3).

6. Federal Courts 101

Resolution Trust Corporation's removal of case from state court to district court for the District of Columbia did not bar Corporation from seeking to have case transferred to another district. Federal Home Loan Bank Act, § 21A(l)(3), as amended, 12 U.S.C.A. §

1441a(l)(3); 28 U.S.C.A. § 1404(a).

7. Federal Courts 101

Prior ruling by federal district court in Minnesota that Resolution Trust corporation could not remove case to federal court in Minnesota did not prohibit transfer of case to federal district court in Minnesota. Federal Home Loan Bank Act, § 21A(l)(3), as amended, 12 U.S.C.a. § 1441a(l)(3); 28 U.S.C.A. § 1404(a).

8. Federal Courts 106

Federal court in Minnesota was in district in which former bank employee's wrongful termination action might have been brought, and, thus, case could be transferred there after Resolution Trust Corporation was substituted as defendant and

Corporation removed case to federal district court for the District of Columbia; trial was half completed; all primary parties and witnesses were located in Minnesota; and Minnesota law controlled. Federal Home Loan Bank Act, §21A(l)(d), as amended, 12 U.S.C.A. § 1441a(l)(3); 28 U.S.C.a. § 1404(a).

9. Federal Courts 141

Court deciding whether to transfer case cannot blindly consider case as it was at time that it was filed without considering dismissal or substitution of parties or effect of statutory changes. 28 U.S.C.A. §1404(a).

William P. Luther, Luther, Ballenthin & Carruthers (Daniel A. Rezneck, of counsel), Arnold & Porter, Washington D.C., for plaintiff.

Dennis S. Klein, Lawrence F. Bates, Laura Lane, Hopkins & Sutter, Washington, D.C., for defendants.

MEMORANDUM OPINION

THOMAS F. HOGAN, District Judge.

BACKGROUND

Plaintiff Peter R. Piekarski commenced this action in November, 1988, in the District Court of Hennepin County, District of Minnesota, Fourth Judicial District. He alleged that he was wrongfully terminated from his position as Vice President of Mortgage Lending of Home Owners Savings Bank in Fergus Falls, Minnesota ("Home Owners-Fergus

Falls"). Other named defendants were: Home Owners Savings Bank of Boston ("Home Owners"), the parent company of Home Owners-Fergus Falls; Knutson Mortgage, a subsidiary of Home Owners; and M. Gene Donley, president of Home Owners-Fergus Falls. Venue was changed to the District Court of Otter Tail County, Minnesota, Seventh Judicial District, where, after discovery, a bifurcated liability/damage trial was scheduled.

On December 7, 1989, Judge Harlan L. Nelson of the Otter Tail County District court presided over phase one of the bifurcated trial before an advisory jury. All defendants were found liable. Judge Nelson issued his findings of fact, conclusions of law,

and order for judgment in favor of the plaintiff on February 20, 1990.[1]

On April 27, 1990, before Judge Nelson had reached phase two of the trial (the damages phase), the Office of Thrift Supervision declared Home Owners insolvent and appointed the Resolution Trust Corporation ("RTC") as Conservator. Pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), the RTC "by operation of law succeed[ed] to all rights, powers and privileges of [Home Owners]

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[1] Judge Nelson found liability based on breach of contract, retaliatory discharge, and intentional interference with business relations. Additionally, he found liability for compensatory damages as to all the defendants, and liability for punitive damages as to defendant M. Gene Donley individually.

. . . ." 12 U.S.C. §1441a(b)(4). The RTC was substituted as a party for Home Owners.

On May 7, 1990, the RTC removed this case to the United States District Court of the District of Minnesota, arguing that 12 U.S.C. § 1819(b)(2)(B) and 28 U.S.C. § 1441(a) supported the removal. RTC's removal was followed with a motion to remand the case to the District Court in Otter Tail County by Mr. Piekarski. On June 1, 1990, RTC opposed the remand, arguing that the case was properly removed to the federal court in Minnesota. In the alternative, the RTC requested a transfer of the case to this Court, the United States District Court for the District of

Columbia, pursuant to 28 U.S.C. § 1631 and 28 U.S.C. § 1406(a). On June 11, 1990, Judge Edward J. Devitt granted plaintiff's motion to remand the case. In summary, he held that defendants could not remove to the United States District Court for the District of Minnesota under 12 U.S.C. § 1441a(l) because RTC did not initiate the suit and because Mr. Piekarski's wrongful termination action arose without the involvement of the RTC.[2] He held that defendants "could only have removed to the United States District Court for the District of Columbia." Memorandum

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[2] The RTC's April 27, 1990, appointment as Conservator came seventeen months after Mr. Piekarski's original complaint was served in November, 1988, and four months after the liabilities portion of the trial was concluded on December 7, 1990.

Opinion and Order, *Piekarski v. Home Owners Saving Bank, et al.*, Civ. 3-90-248, United States District Court, District of Minnesota, Third Division, June 12, 1990 (Devitt, J.), at 5. Judge Devitt remanded the case back to Otter Tail District Court, and, over the defendants' objections, refused to grant defendants' motion to transfer venue to the District of Columbia.[3]

On June 15, 1990, the RTC removed this case from the Otter Tail District

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[3] Judge Devitt held that, although he had the power to transfer the case, "[c]onsiderations of equity and judicial economy weigh[ed] against transfer." Memorandum Opinion at 5.

Court of Minnesota to this Court.[4] Currently before the Court are plaintiff's motion to remand to the Otter Tail District Court and RTC's motion to transfer the case to the United States District Court for the District of Minnesota, pursuant to 28 U.S.C. § 1404(a). In consideration of the motions, the responses filed thereto, the hearing held on July 19, 1990, and for the reasons stated below, the Court shall deny plaintiff's motion to remand the case to the Otter Tail District Court and shall grant RTC's motion to transfer

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[4] Judge Gesell of this Court granted RTC's motion for a temporary restraining order on June 19, 1990, to prohibit the state court from proceeding on the damages portion of the trial, which was scheduled to commence on June 19, 1990.

this case to the United State District court for the District of Minnesota.

PLAINTIFF'S MOTION TO REMAND

[1] FIRREA provides for original federal court jurisdiction over all actions, suits, or proceedings to which the RTC is a party:

> Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the Corporation is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit or proceeding.

12 U.S.C. § 1441a(l)(1). FIRREA also gives the RTC the absolute right, subject to certain time restraints, to remove *any* case from a state court in which it is named or is substituted as a party, pursuant to 12 U.S.C. § 1441a(l)(3)(emphasis supplied):

> The Corporation may, without bond or security, remove *any* such action, suit or proceeding from a State court to the United States District Court for the District of Columbia, or if the action, suit or proceeding arises out of the actions of the Corporation with respect to an institution for which a conservator or a receiver has been appointed, the United States district court for the district where the institution's principal business is located. The removal of any action, suit or proceeding shall be instituted --
>
> (A) not later than 90 days after the date the Corporation is substituted as a party, or
>
> (B) not later than 30 days after the date suit is filed against the Corporation, if such suit is filed after the date of enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989. The Corporation may appeal any order of remand entered by a United States district court.

[2] This case was properly removed to this Court, pursuant to 12 U.S.C. §1441a(l)(3). When the RTC was

substituted as a party for Home Owners in the suit proceeding in the Otter Tail District Court, RTC had the right to remove the case to this Court, regardless of the stage of the proceedings, as long as RTC removed within the time limits imposed by the statute.[5] Judge Devitt's ruling does not conflict with this interpretation if FIRREA. Judge Devitt was considering only whether removal was proper to the United States district

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[5] FIRREA's language is quite broad, and does not limit removal to those cases in which no action has been taken by state court. While the Court agrees with the plaintiff, that the result in this case is particularly harsh given the interruption of the state court proceedings in mid-trial, the Court nonetheless is bound to follow the language of the statute.

Court for the District of Minnesota. He held that it was not, since the action did not "arise out of the actions of the [RTC]." *See* Memorandum Opinion at 5. The RTC did not initiate the suit, and the wrongful termination action arose without the involvement of the RTC. Based on his reading of 12 U.S.C. § 1441a(l)(3), the suit could not be removed to the federal court in Minnesota, but could only have been removed to the United States District Court for the District of Columbia. This Court agrees with his interpretation. *See also, Federal Savings and Loan Ins. v. Westgate Partners*, 726 F.Supp. 807, 809 (D.Colo. 1989).

[3, 4] Mr. Piekarski raises several arguments as to why his current motion for remand should be granted. He argues that his present motion for remand should be granted because RTC is attempting to remove for a second time, in contravention of the law of the case and of FIRREA. The court rejects his arguments. FIRREA does not prohibit a party from correcting the defective removal attempted to a Court. RTC merely cured its original mistake of removing this action to the United States District Court for the District of Minnesota by removing this case to this Court Judge Devitt did not hold that *any* removal was improper -- instead, he held merely that removal was improper to the federal

court in Minnesota. Thus, there is no law of the case which served to bar this removal.

[5] Mr. Piekarski argues that this Court should grant his motion to remand based on principles of abstention and judicial economy, since half of the trial has already been completed. The Court is sympathetic to his arguments. Unfortunately, it is not the law. The Court reads FIRREA's removal provision as giving the RTC the absolute right to remove to federal court, subject to the time limitations imposed in the statute. This Court cannot remand a case properly removed to it for discretionary reasons not authorized by the controlling statute. *Thermtron*

Products v. Hermansdorfer, 423 U.S. 336, 345 n.9, 96 S.C.t 584, 590 n.9, 46 L.Ed.2d 542 (1976). Nothing in FIRREA authorizes remand for the reasons of judicial economy or abstention. Plaintiff relies on *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), which held that there may be exceptional circumstances in which a federal court should abstain when there are concurrent proceedings pending in a state judicial forum. However, *Colorado River* is inapplicable. There is no concurrent state proceeding to which this Court can defer in the instant case. Instead, there is *one* case, which

originally was in state court, but now has been properly removed to federal court.

Thus, the Court will deny plaintiff's motion to remand this case to the District Court of Otter Tail.

RTC'S MOTION TO TRANSFER

In its opposition to the plaintiff's motion to remand, RTC suggested that this case be transferred to the United States District Court for Minnesota, pursuant to 28 U.S.C. § 1404(a). *See* RTC's Opposition to Plaintiff's Motion to Remand at 16. At oral argument, the Court requested further briefing on the legal basis for such a transfer. The RTC filed a Memorandum in Support of Transfer, which the Court shall treat as a motion to

transfer pursuant to 28 U.S.C. § 1404(a). The plaintiff opposes the transfer.

[6,7] 28 U.S.c. § 1404(a) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

By its terms, 28 U.S.C. §1404(a) applies to "any civil action." *See* Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3843 at 323. The fact that the RTC removed the case from state court to this court does not bar the RTC from seeking to have this case transferred to another district. Once the action has been removed to federal court, it should proceed as if it had been brought in federal court originally.

Id. See also, Chicago, R.I. & P.R. Co. v. Igoe, 212 F.2d 378, 383 (7th Cir. 1954)(and cases cited therein). Thus the prior ruling in this case that it was improper for RTC to *remove* to the federal court in Minnesota from the state court in Otter Tail County, does not prohibit either a motion to transfer, or a ruling to transfer this case to the United States District court for the District of Minnesota, pursuant to 28 U.S.C. § 1404(a) at this juncture.

[8] The crucial question for the Court is whether or not the federal court in Minnesota is a district where this action "might have been brought." The Supreme Court construed this language of 28 U.S.C. § 1404(a) in

Hoffman v. Blaski, 363 U.S. 335, 80 S.ct. 1084, 4 L.Ed.2d 1254 (1960). In *Hoffman*, the Supreme Court reviewed two cases in which defendants had moved for a transfer under § 1404(a) to a district in which plaintiff was unable to serve the defendants with process without the defendants' consent. The defendants each stipulated to waiving all objections to venue, and submitted to jurisdiction. The Supreme Court held that the power to transfer under § 1404(a) does not depend "upon the wish of the defendant" and that the phrase "where it might have been brought" cannot be interpreted to mean "where it may now be rebrought, with defendants' consent." *Hoffman*, 363

U.S. at 342, 343, 80 S.Ct. at 1088-89, 1089.

[9] Courts interpreting *Hoffman* have been particularly cognizant of the danger the Supreme Court was seeking to avert -- enabling a defendant vastly to increase the options for venue of a suit by merely consenting to a change of venue to a district in which it could not have been served at the time the plaintiff filed the suit. *Hoffman* has not been read so broadly as to impede Congressional policy designed to make access to the courts easier for plaintiffs, *see Pruess v. Udall*, 359 F.2d 615, 619 (D.C.Cir. 19660, or to require "following 'a maxim or a definition with relentless disregard of consequences to a dryly

logical extreme.'" *In re Fine Paper Antitrust Litigation*, 685 F.2d 810 (district court not required to confine its venue consideration to the facts as they existed at time of the complaint, since party who could have objected to venue was no longer a party to the suit), as have statutory changes, *see Pruess*, 359 F.2d 616 (action could not have been brought in Oregon when the action was filed because of lack of venue, but case could be transferred there since a statutory change subsequent to the bringing of the suit allowed venue in Oregon). The Court cannot blindly consider the case as it was at the time it was filed in reaching its decision, without considering the

dismissal or substitution of parties or the effect of statutory changes.

In this case, the Supreme Court's concern in *Hoffman* is not presented. This is not a situation in which RTC was named as an original defendant by the plaintiff, nor is it the case that the plaintiff, absent RTC's consent, would be unable to serve the RTC with process in the district of Minnesota. Instead, when RTC became Conservator for Home-Owners, RTC was substituted as a party by power of statute. Had RTC been named as a defendant at the commencement of the suit, the suit "might have been brought" in Minnesota. The federal court in Minnesota has jurisdiction over the action pursuant to 12 U.S.C. §

1441a(l)(1), and venue would be proper in Minnesota, pursuant to 28 U.S.C. § 1391(b), since the cause of action arose in Minnesota. RTC can be served with process in the district of Minnesota and the party for which RTC was substituted was capable of being served with process in Minnesota. Thus, the United States District Court for the District of Minnesota is a district where this action "might have been brought" within the meaning of 28 U.S.C. § 1404)(a).

Judge Devitt's ruling that the district of Minnesota was not a district to which the case could be *removed* under FIRREA does not preclude this Court's finding that a *transfer* to the district of Minnesota is

appropriate pursuant to 28 U.S.C. §1404(a).

Plaintiff argues that the statute specifically identifies the District of Columbia federal court as a court Congress desired to develop expertise on the saving and loan crisis that has emerged in the past several years. However, the Court can think of no expertise it would need to employ or would gain in resolving what remains open in the damages phase of this wrongful termination case brought exclusively under Minnesota law.

The facts of this case are particularly compelling and support a transfer for the convenience of the parties and witnesses and in the interests of justice. Half of the

trial is already completed. The trial on liability was conducted in Minnesota, and the case is a run-of-the-mill wrongful employment termination action brought under Minnesota state law.[6] All of the primary parties are located in Minnesota. All the witnesses are located in Minnesota. All the wrongful employment actions took place in Minnesota. In fact, the Court can

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[6] The Court wonders whether Congress realized the extent to which its broad language would force suits out of state court into the federal courts. Were it not for the broad removal language in FIRREA, the Court would see no reason to interrupt an on-going state proceeding to grant the RTC the "benefit" of a federal forum. The Court can see no potential for abuse by allowing RTC to defend such an action in state court.

think of no reason to keep this case here.

The Court holds that while this action could not be removed to the federal court in Minnesota from a state court, it can be transferred there from the United States District court for the District of Columbia pursuant to 28 U.S.C. § 1404(a). The Court acknowledges that this is an exercise in legal gymnastics. However, the Court can see no other way to act on the intent of Congress, both with regard to FIRREA and the change of venue statute. Congress would be wise to revisit the FIRREA removal provisions to consider whether a federal forum is necessary in every case involving RTC (particularly those

involving only issues of state law), and to consider whether a party such as those in this case will be forced to first remove to this court, and then present a motion for transfer to a forum more suited to complete the litigation.

CONCLUSION

For the foregoing reasons, plaintiff's motion to remand shall be denied, and defendants' motion to transfer to the United States District Court for the District of Minnesota shall be granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
FOURTH DIVISION

Peter R. Piekarski, Plaintiff,	)	**Civil Action No. 4-90-661**
-vs-	)	**AFFIDAVIT OF LAWRENCE P. SCHAEFER**
Home Owners Savings Bank, F.S.B., et al., Defendants.	)	

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

COMES NOW AFFIANT LAWRENCE P. SCHAEFER, being first duly sworn upon oath, deposes and states as follows:

1. I am counsel representing the defendants in the above-captioned matter.

2. On April 5, 1991, the above captioned defendants filed a Notice of

Appeal and Appellant's Information Form A in the above referenced mater. A copy of these pleadings are attached hereto as Exhibits A and B.

3. On Wednesday, April 17, 1991, I received a telephone call from Susan Thomas, a clerk for the Eighth Circuit Court of Appeals, informing me that pursuant to the authority of United States v. Schneider, 926 F.2d 777 (8th Cir. 1991) there might be a jurisdictional defect in the above-referenced Notice of Appeal. This pleading is captioned "Home Owners Savings Bank, F.S.B., et al." as Defendants. The Appellant Information Form, however, clearly indicates that the appellants in this matter are Home Owners Savings Bank, F.S.B., and M.

Gene Donley.

4. To ensure that no confusion would arise regarding appellate jurisdiction, on Wednesday, April 17, 1991, immediately after speaking to clerk Thomas, I prepared an Amended notice of Appeal, to be filed that day or on Thursday, April 18, 1991, the last day that a timely Notice of Appeal pursuant to Federal Rule of Civil Procedure 4(a)(1) could be filed. Attached as Exhibits C, D and E are the signed original of the Amended Notice of Appeal, the transmission letter enclosing same, and the internal messenger request form directing that these documents be filed on Thursday, April 18, 1991.

5. I was in a hearing all day Thursday, April 18, 1991. A facsimile transmission from defendant M. Gene Donley that was unrelated to the above described documents arrived that morning, and during a break from the hearing I briefly discussed this document with my secretary. From this discussion my secretary formed the mistaken impression that the previously executed Amended Notice of Appeal was not to be filed that day, despite earlier instructions. I was not informed by my secretary until Friday, April 19, 1991 that the Amended Notice of Appeal not filed in a timely fashion pursuant to rule 4(a)1.

6. Defendant's now move the court pursuant to Federal Rule of Appellate procedure 4(a)5 for an Order extending the time for filing the attached Amended Notice of Appeal (Exhibit C) as the above described conduct constitutes excusable neglect, and the attached Exhibit B clearly indicates that the appellants are both defendants remaining in this action. Exhibit B was served upon the attorney for the plaintiff, and therefore no prejudice would occur should the Amended Notice of Appeal be filed immediately upon notification of this

Court's Order.

FURTHER AFFIANT SAYETH NOT.

/s/Lawrence P. Schaefer

Lawrence P. Schaefer

Subscribed and sworn to before
me this ____ day of April, 1991.

/s/Julie M. Balot

Notary Public

- SEAL -

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
FOURTH DIVISION

Peter R. Piekarski, Plaintiff, -vs- Home Owners Savings Bank F.S.B., et al. Defendants.	Civil Action No. 4-90-661 NOTICE OF APPEAL

Notice is hereby given that above named defendants hereby appeal to the United States Court of Appeals for the Eighth Circuit from the final judgment entered in this action on the 19th day

of March, 1991.

Dated: April 4, 1991

Respectfully submitted,

/s/Lawrence P. Schaefer

Charles A. Mays (#69218)
Lawrence P. Schaefer (#195583)
LEONARD, STREET AND DEINARD
Suite 2300
150 South Fifth Street
Minneapolis, Minnesota 55402
Telephone: (612) 335-1500

ATTORNEYS FOR DEFENDANTS

EXHIBIT B

Docket No.

U.S. COURT OF APPEALS - EIGHTH CIRCUIT

APPELLANT'S FORM A
Appeal Information Form
To be filed with the Notice of Appeal

STYLE OF CASE:	COUNSEL: NAME, ADDRESS, AND TELEPHONE NO.
HOME OWNERS SAVINGS BANK F.S.B. and M. GENE DONLEY (Appellant/ Appellee)	Charles A. Mays Lawrence P. Schaefer LEONARD, STREET AND DEINARD, P.A. 150 South Fifth Street, Ste 2300 Minneapolis, Minnesota 55402 (612) 335-1500
vs.	
PETER R. PIEKARSKI (Appellant/ Appellee)	William P. Luther LUTHER, BALLENTHIN & CARRUTHERS 4624 IDS Center Minneapolis, Minnesota 55402 (612) 338-1931

DATE OF DISTRICT COURT JUDGMENT:

March 19, 1991

BASIS OF: DISTRICT COURT JURISDICTION/APPELLATE JURISDICTION:

Financial Institution Reform Recovery and Enforcement Act of 1989 grants original jurisdiction.

JURISDICTIONAL ISSUE, IF ANY: None

IS THIS CASE SUITABLE FOR CONSIDERATION IN THIS COURT'S SETTLEMENT PROGRAM?

( ) Yes. (x) No. If no, state why:

No basis for liability

APPROPRIATE STANDARD OF APPELLATE REVIEW: Mistake of law/clearly erroneous

LIST ISSUES ON APPEAL: (List below and if necessary attach supplementary page.) Optional -- Include citations for each issue and in injury cases attach challenged instructions and trial memoranda. DOES THIS CONSTITUTE YOUR STATEMENT OF ISSUES UNDER FRAP 10 (b)(3)? ( ) Yes. (x) No.

See Supplemental Page

Submitted by: /s/ 4/5/91

Signature Date

ISSUES

I. Whether the trial court erred in finding liability based upon:

A) Breach of Contract against both defendants;

B) Retaliation in violation of Minn.Stat. § 181.932 and the common law against both defendants;

C) Misrepresentation against both defendants;

D) Interference with Contract against defendant M. Gene Donley.

II. Whether the trial court erred in awarding punitive damages against defendant M. Gene Donley.

III. Whether the trial court erred in awarding front pay damages to plaintiff.

IV. Whether the trial court erred in awarding damages:

A) beyond the point at which the Resolution Trust Corporation was appointed conservator over defendant Home Owners Savings Bank of Burlington-Massachusetts;

B) beyond the point at which the plaintiff ceased looking for a comparable job;

C) beyond the point at which the defendants unconditionally offered plaintiff his job back.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

JULIE M. BALOT, of the City of Minneapolis, County of Hennepin, State of Minnesota, being first duly sworn upon oath, states that on the 5th day of April, 1991, on behalf of appellants she serve APPELLANT'S FORM A upon appellee Peter R. Piekarski, through his counsel, by causing to be mailed true and correct copies thereof, enclosed in an envelope, postage prepaid, and by depositing same in the post office at Minneapolis, Minnesota, directed to the last known address of the persons listed below:

William P. Luther, Esq.
Luther, Ballenthin & Carruthers
4624 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402

/s/ Julie M. Balot

Julie M. Balot

Subscribed and sworn to before me
this 5th day of April, 1991.

/s/Clarice M. Davis

Notary Public

-- seal --

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
FOURTH DIVISION

Peter R. Piekarski, Plaintiff,	**Civil Action No. 4-90-661**
-vs-	**AMENDED NOTICE OF APPEAL**
Home Owners Savings Bank F.S.B., and M. Gene Donley, Defendants.	

Notice is hereby given that above named defendants hereby appeal to the United States Court of Appeals for the Eighth Circuit from the final judgment entered in this action on the 19th day

of March, 1991.

Respectfully submitted,

Dated: April 17, 1991

Charles A. Mays (#69218)
Lawrence P. Schaefer (#195583)
LEONARD, STREET AND DEINARD
Suite 2300
150 South Fifth Street
Minneapolis, Minnesota 55402
Telephone: (612) 335-1500

ATTORNEYS FOR DEFENDANTS

EXHIBIT D

LAW OFFICES
LEONARD, STREET AND DEINARD
PROFESSIONAL ASSOCIATION
SUITE 2300
150 SOUTH FIFTH STREET
MINNEAPOLIS, MINNESOTA 55402

April 18, 1991

BY MESSENGER

Clerk of the U.S. District Court
United States District Court
District of Minnesota
110 South Fourth Street
514 U.S. Courthouse
Minneapolis, Minnesota 55401

Re: Peter R. Piekarski v. Home Owners Savings Bank, F.S.B., et al.
Civil Action No. 4-90-661

Dear Clerk:

Enclosed herewith for filing is the original and two copies of an Amended Notice of Appeal.

Very truly yours,

LEONARD, STREET AND DEINARD

By
Lawrence P. Schaefer

LPS/jmb
Enclosures

EXHIBIT E

ERRAND REQUEST

Requested by: Larry Schaefer

Ext. 1664

Date: April 18, 1991

Time: 9:00 a.m.

Delivery: X **Pick-up:**

DEADLINE (TIME):

Service: **Filing:** X

Approved for Outside Delivery?
Yes: X **No:**

Immediate Notification of Delivery?
Yes: **No:**

Name: Clerk of the United States District Court

Company Name: United States Courthouse

Address: 110 South Fourth Street
514 U.S. Courthouse
Minneapolis, Minnesota

Telephone:

Special Instructions: Please deliver envelope to clerk's office for filing. Thank you.

Client Name: Home Owners Savings Bank

Client Number: 8412-12166

Completed by:

Time:

Comments:

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 91-2132MNMI

Peter R. Piekarski,	*	**Order**
	*	**Denying**
Appellee,	*	**Petition**
	*	**for Rehearing**
vs.	*	**and**
	*	**Suggestion**
Home Owners Savings Bank, et al.,	*	**for Rehearing**
	*	**En Banc**
	*	
Appellants.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

April 8, 1992

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

VENUE GAME

An obscure clause in the 1989 FIRREA legislation permits the Resolution Trust Corp. to uproot cases from their relevant locality and handle them in Washington, D.C.

More than a year after passage of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, a little-noticed portion of this legislation has attracted increasing attention. This provision, 12 U.S.C. 144a(l)(3), gives the Resolution Trust Corp., in its capacity as successor to a failed savings-and-loan institution, authority to remove all such cases in which it becomes a litigant from state court, anywhere in the United States,

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* By Stephen W. Grafman. Mr. Grafman is a partner in the Washington D.C. office of Kirkpatrick & Lockhart.

to a single forum -- the U.S. District Court for the District of Columbia. So far, upwards of 100 or so such cases have been removed to the District of Columbia with the potential for many more to come.

One can only wonder whether Congress truly appreciated its full impact. At least one District of Columbia federal judge, Gerhard A. Gesell, has noted that this FIRREA provision is part of "a less than precisely worded statute." Indeed, it seems difficult to fathom why Congress would afford the RTC the right to remove to the District of Columbia every state court case in which the RTC finds itself a party in its capacity as successor-in-interest to

the affairs of a troubled thrift,when there is no central federal matter at issue i the large majority of these cases. In fact, these cases are often purely local in nature.

The legislative directive under consideration, moreover, stands in striking contrast to a now-superseded earlier provision. (12 U.S.C. 1730 [k][l][c]). This pre-FIRREA provision provided RTC's predecessor, the Federal Savings and Loan Insurance Corp., with a right of removal from a state court to a U.S. District court "for the district and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect."

There is nothing in the history of the present legislation, moreover, that contradicts the more restrictive language of this new FIRREA provision. Yet, language and legislative history notwithstanding, Judge Gesell was promoted to opine:

> There is no indication that congress intended by enacting the removal provision of FIRREA to bring in every sort of local case to this court, no matter how intertwined with local affairs and local laws. Counsel for RTC has argued in other removed cases before this Court that Congress envisioned that this Court would develop specific expertise in RTC cases, but Congress could not conceivably have envisioned that the trial judges here would become expert in the laws of all 50 states and territories.

The general counsel of the House Banking Committee, with knowledge of the legislative drafting at issue, reportedly is of a somewhat different

persuasion. Her views, as reported in several accounts, are to the effect that FIRREA's removal language was intended to give RTC lawyers a *choice* as to which federal court to remove a case to, and was *not* designed to limit the RTC to the federal district court in Washington.

Regardless of rationale, though, litigants throughout the United States are hardly pleased to learn that their cases summarily can be removed to Washington, D.C. by the RTC. Similarly, the federal judiciary in Washington, faced with an influx of such cases is equally, if not more, disenchanted. Indeed, Stanley Harris, a District of Columbia federal judge, looking toward corrective

clarification, reportedly has called for the amendment of this FIRREA provision. Yet, remedial legislation does not appear to be in the immediate offing.

So what should be done? Maybe nothing: after all, in today's emotionally charged climate, some may ask why one should sympathize with the S&L Industry. "They deserve it," may be the rejoinder. Yet, emotion aside, "they" often are innocent third parties with claims "frequently of a localized nature) against a defunct or otherwise insolvent S & L newly represented by an RTC standing in the shoes of the ousted thrift.

Accordingly, even if the District of Columbia federal court is able to

digest its increased caseload, the fundamental question remains: Is it fair to litigants who find themselves faced with the prospect of pursuing localized claims in what often will be a geographically remote forum in the nation's capital? With this question in mind, yet another member of the District of Columbia federal judiciary, Judge Thomas F. Hogan, recently opined that "Congress would be wise to revisit the FIRREA removal provisions to consider whether a federal forum is necessary in every case involving RTC (particularly those involving issues of state law)."

This FIRREA provision, when viewed in the context of various cases transferred to the District of

Columbia, clearly runs counter to traditional concepts of jurisdiction, venue, *forum non conveniens* and removal as well as traditional concepts of due process. That is, the general federal removal statute allows removal under appropriate circumstances from a state to a federal court but at the same time mandates such removal to the federal court in that *same* jurisdiction.

Federal venue statutes are, for the most part, intended to provide a meaningful nexus to the court in which the case will be litigated. The concept of *forum non conveniens*, as recognized in federal law, serves as an equitable check upon the plaintiff's forum selection, allowing

transfer to a more appropriate forum when concepts of fairness require such an approach. Specifically this enactment provides that "for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought" (28 U.S.C. 1404[a]). Yet under FIRREA, RTC removal authority mandates transfer to the District of Columbia without regard for "the convenience of parties and witnesses" or, indeed, "the interests of justice," among other statutory considerations.

To surmount this problem, various members of the District of Columbia federal judiciary have opted to read

the FIRREA removal/venue provision in tandem with Sec. 1404(a), leading in practical application to what for lack of a better description, may become known as S&L hopscotch or the RTC shuffle. That is, a case is first removed by RTC from a state court to the federal court in Washington, D.C. per FIRREA; once in Washington, it is then transferred, per Sec. 1404(a), this time to yet another federal court, most often in the state from which it was removed.

This result occurred, for example, in a recently reported lawsuit involving the alleged wrongful termination of a former S&L executive. There the case wound its way through a labyrinth of transfers, traveling from

a state court in Otter Tail County, Minn. to the federal court in the District of Columbia and finally to the federal court back in Minnesota, the state from which this judicial odyssey began. This time consuming and convoluted transfer procedure caused D.C. federal Judge Hogan to seriously question the congressional wisdom that necessitates removal to the District of Columbia, so that the federal court in Washington can then and only then, turn the case around and effectuate a transfer to yet another federal forum better suited to the completion of the litigation.

Various other cases have received such hopscotch justice, and no doubt there will be more. A recent case in

point involves litigation respecting alleged breaches of a loan commitment by a thrift now under RTC control. This lawsuit, originally filed in a New Jersey state court, was removed by the RTC to the District of Columbia federal court. Later, the case was transferred from Washington back to the federal court in New Jersey, where it now is to be tried. Acting in reliance upon the federal change-of-venue provision as set forth in 28 U.S.C. 1404(a), the federal court in the District of Columbia, Judge Thomas Penfield Jackson stated:

> In exercising its discretion [under 1404(a)], the court may consider such factors as case of access to evidence that needs to be discovered, the availability of compulsory process, the difficulties inherent in

> assembling and presenting a case at a remove from office from office support services, and similar other intensely practical aspect of conducting complex litigation. In this case, [the plaintiffs] have identified both specific witnesses and documents which are to be found only in New Jersey and environs; RTC has identified neither in the District of Columbia. Transfer to the District of New Jersey would therefore appear to be "convenient" to both sides, RTC's protestations to the contrary notwithstanding.

Given the RTC, removal authority, Judge Jackson's approach (similar to that of Judges Hogan and Gesell) seemingly is both necessary and desirable under the circumstances and in addition is in accord with respected authority that Sec. 1404(a) "is a comprehensive, general statute applicable to all civil actions without exception."

But whether intended or not, the current FIRREA removal/venue legislation, even when applied in conjunction with Sec. 1404(a), can and often does lead to uncertainty and, ultimately, to a rather awkward and time-consuming transfer patter that does more justice to a Rube Goldberg cartoon than to conventional notions of due process.

One thing, though, is crystal clear. This newly evolving game of legal hopscotch makes no sense. Congress should untangle this time-wasting and illogical procedure at the earliest possible time.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Peter R. Piekarski,

Plaintiff,

vs.

Civ. 3-90-248
Memorandum and Order

Home Owners Savings Bank, F.S.B., f/k/a Western Minnesota Federal Savings and Loan Association, f/k/a Fergus Falls Savings and Loan Association; Knutson Mortgage Corporation, a Delaware corporation; Home Owners Federal Savings and Loan Association, a federally chartered savings and loan association; and M. Gene Donley,

Defendants.

William P. Luther, Luther, Ballenthin & Carruthers, Minneapolis, Minnesota, for plaintiff.

James G. Bullard and Lawrence P. Schaefer, Leonard, Street and Deinard, Minneapolis, Minnesota, for defendants.

Introduction

In this federal question action for wrongful termination, plaintiff moves to vacate the May 9, 1990 order of this court temporarily staying litigation until June 25, 1990, and to remand this case to the District Court of Otter Tail County, District of Minnesota, Seventh Judicial District for further proceedings. Defendants request the court to deny plaintiff's motion to remand and retain venue in this District, or, in the alternative, transfer venue to the United States District Court for the District of Columbia. For the reasons set forth below, plaintiff's motions to vacate the stay and to remand are granted,

and defendants' motion to transfer is denied.

Background

Plaintiff Peter R. Piekarski alleges wrongful termination of employment from his position as vice president of Mortgage Lending of Home Owners Savings Bank in Fergus Falls, Minnesota. Defendants include Home Owners Savings Bank, F.S.B. (Home Owners), Knutson Mortgage, a wholly owned subsidiary of Home Owners, and M. Gene Donley, president of Home Owners.

The lawsuit was initiated in November 1988 in the District Court of Hennepin County, District of Minnesota, Fourth Judicial District. Venue was later changed to the

District Court of Otter Tail County, District of Minnesota, Seventh Judicial District. Judge Harlan L. Nelson bifurcated for trial the issues of liability and damages. The liability portion was tried and concluded on December 7, 1989. The trial court's findings of fact, conclusions of law and order for judgment were entered and filed in favor of plaintiff on February 20, 1990. The damages portion is set to commence on June 19, 1990.

On April 27, 1990, the Office of Thrift Supervision appointed the Resolution Trust Corporation (RTC) as

sole Conservator for defendant Home Owners.[1] On May 7, 1990, pursuant to its appointment as Conservator, the RTC and the above-entitled defendants filed a notice of Removal and Application for Temporary Stay of Litigation. The next day, May 8, 1990, Magistrate Noel granted defendant a 45 day stay until June 25, 1990. The plaintiff has filed a motion to remand, claiming the removal was improper.

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[1] As the Conservator of Home Owners, the RTC is also effectively the Conservator over defendants Knutson and Home Owners-Fergus Falls, since these entities are direct subsidiaries of the institution under Conservatorship.

Discussion

A. Plaintiffs Motion to Remand

In its Notice of Removal, defendants claim that removal is proper pursuant to 28 U.S.C. §§ 1441(a), 1442(a) and 1446, as well as Section 209 of FIRREA, 12 U.S.C. §1819 (b)(2)(B). None of these provisions provide the appropriate basis for removal from state court in this case.

Defendants' primary basis for removal to this court is the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub.L. No. 101-73, 103 Stat. 183 (1989). Section 209 of FIRREA provides, in pertinent part, that "the Corporation [the RTC] may, without

bond or security, remove any action,suit or proceeding from a State court to the appropriate United States District Court." 12 U.S.C. § 1819 (b)(2)(B).

Despite defendants' arguments to the contrary, Section 501 of FIRREA, 12 U.S.C. § 1441a (l)(1-3), governs the appropriate United States District Court to which removal is proper. Section 209 cannot be interpreted independently form the specific removal provisions of Section 501. *See Federal Sav. and Loan Ins. v. Westgate Partners*, 726 F.Supp. 807, 809 (D.Col. 1989). Section 501 added § 21A to the Federal Home Loan Bank Act, 12 U.S.C. § 1421 *et seq.* Section 21A created the Resolution Trust

Corporation and provides the controlling removal and remand provisions. The statute provides that removal may be made to the United States District Court for the district of Columbia, or "if the action, suit, or proceeding arises out of the actions of the Corporation with respect to an institution for which a conservator or receiver has been appointed, the United States district court for the district where the institution's principle business is located." 12 U.S.C. § 1441a (l)(3).

The legislative history provides no assistance in interpreting Section 501. *See* H.R.Rep. No. 54(I), 101st Cong., 1st Sess., 362 *reprinted in* 1989 U.S. Code Cong. & Admin.News at

158. The plain language of the provision provides for removal of suits to the District of Columbia. If, however, the RTC initiates the suit with regard to an institution under receivership or conservatorship, removal may be to the court with jurisdiction over the principle place of business of the institution. *Westgate Partners*, 726 F.Supp. at 809.

Here, the RTC did not initiate suit. Plaintiff's wrongful termination action arose without the involvement of the RTC. The RTC's April 27, 1990 appointment as Conservator came seventeen months after plaintiff's original complaint was served in November, 1988, and four months after the liabilities portion

of the trial was concluded on December 7, 1990. Accordingly, defendants could only have removed to the United States District Court for the District of Columbia.

Defendants' second basis for removal to this court is 28 U.S.C. §§ 1441(a) and 1446. Section 1441(a) is irrelevant when jurisdiction is based on another statute. *Westgate Partners*, 726 F.Supp. at 809. Defendants' third basis for removal to this court is 28 U.S.C. §1442(a). Section 1442(a) governs removal of only civil and criminal actions "commenced in a state court against any of the following persons . . . (1) Any officer of the United States or any agency thereof, . . . " The present

action was clearly not commenced by an agency of the United States. The RTC was appointed conservator for defendant Home Owners over a year after plaintiff commenced this lawsuit.

B. Defendant's Motion to Transfer Venue

Defendants argue that if venue is to be determined under Section 501 of FIRREA, the "interests of justice" demand that the court transfer venue to the District of Columbia pursuant to 28 U.S.C. §1631 and 28 U.S.C. §1406(a). This court does have the power to transfer the case under either act, and while these sections are often invoked to cure defects of personal jurisdiction or when cases are improperly removed, it would not be appropriate to enlist their

assistance in this case.

Considerations of equity and judicial economy weigh against transfer. The underlying action involves exclusively questions of state law, and the majority of the case (the liability portion) has already been completed in state court.

Conclusion

Based upon the briefs and arguments of counsel, and all the files and proceedings herein,

IT IS ORDERED that:

1. Plaintiff's motion to vacate the May 9, 1990 order of this court temporarily staying litigation is GRANTED; and

2. Plaintiff's motion to remand this case to the District Court of Otter

Tail County, District of Minnesota, Seventh Judicial District for further proceedings is GRANTED; and

3. Defendants' motion to transfer to the United States District Court for the District of Columbia is DENIED.

Dated: June 12, 1990

/s/Edward J. Devitt

EDWARD J. DEVITT
United States District Court

CONSTITUTION

of the

UNITED STATES OF AMERICA

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;

nor shall private property be taken for public use, without just compensation.

CONSTITUTION

of the

UNITED STATES OF AMERICA

AMENDMENT 10

The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

F.R.A.P. 3. Appeal as of Right -- How Taken

(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 USC § 1292(b) and appeals by allowance in bankruptcy shall be taken

in the manner prescribed by Rule 5 and Rule 6, respectively.

(b) Joint or Consolidated Appeals. If two or more persons are entitled to appeal from a judgment or order of a district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

(d) Service of the Notice of Appeal. The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the

party at his last known address; and the clerk shall transmit forthwith a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals named in the notice. When an appeal is taken by a defendant in a criminal case, the clerk shall also serve a copy of the notice of appeal upon him, either by personal service or by mail addressed to him. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or his counsel. The clerk shall note in the docket the

names of the parties to whom he mails copies, with the date of mailing.

(e) Payment of Fees. Upon the filing of any separate or joint notice of appeal from the district court, the appellant shall pay to the clerk of the district court such fees as are established by statute, and also the docket fee prescribed by the Judicial Conference of the United States, the latter to be received by the clerk of the district court on behalf of the court of appeals.

§ 1441a(1). Power to remove; jurisdiction

(1) In general

Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the Corporation is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit, or proceeding.

(2) Corporation as party

The Corporation shall be substituted as a party in any civil action, suit, or proceeding to which its predecessor in interest was a party with respect to institutions which are subject to the management

agreement dated February 7, 1989, among the Federal Savings and Loan Insurance Corporation, the Federal Home Loan Bank Board and the Federal Deposit Insurance Corporation.

(3) Removal and remand

The Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States District Court for the District of Columbia, or if the action, suit, or proceeding arises out of the actions of the Corporation with respect to an institution for which a conservator or a receiver has been appointed, the United States district court for the district where the institution's principal business is located. The removal of any

action, suit, or proceeding shall be instituted-

(A) not later than 90 days after the date the Corporation is substituted as a party, or

(B) not later than 30 days after the date suit is filed against the Corporation, if such suit is filed after August 9, 1989.

The Corporation may appeal any order of remand entered by a United States district court.

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods;

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

§ 1404. Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United

States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

(d) As used in this section, "district court" includes the United States District Court for the District of the Canal Zone; and "district" includes the territorial jurisdiction of that court.

(June 25, 1948, ch. 646, 62 Stat. 937; Oct. 18, 1962, Pub.L. 87-845, § 9, 76A Stat. 699.)

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through

service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable ,

except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(c)(1) A petition for removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the petitioner leave to file the petition at a later time.

(2) A petition for removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the

time of the filing of the petition shall constitute a waiver of such grounds, and a second petition may be filed only on grounds not existing at the time of the original petition. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a petition for removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the petition is first denied.

(4) The United States district court to which such petition is

directed shall examine the petition promptly. If it clearly appears on the fact of the petition and any exhibits annexed thereto that the petition for removal should not be granted, the court shall make an order for its summary dismissal.

(5) If the United States district court does not order the summary dismissal of such petition, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the petition as justice shall require. If the United States district court determines that such petition shall be granted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at

any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to

section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

(June 25, 1948, ch. 646, 62 Stat. 939; May 24, 1949, ch. 139, § 84, 63 Stat. 102; July 2, 1964, Pub. L. 88-352, title IX, § 901, 78 Stat. 266; Nov. 19, 1988, Pub. L. 100-702, title X, § 1016(c), 102 Stat. 4670.)

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court

that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

(June 25, 1948, ch. 646, 62 Stat. 947.)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

PETER R. PIEKARSKI,

Plaintiff,

v. **Civ. 4-90-661**

O R D E R

HOME OWNERS SAVINGS BANK, F.S.B., f/k/a/ Western Minnesota Federal Savings and Loan Association, f/k/a Western Minnesota Savings and Loan Association, f/k/a Fergus Falls Savings and Loan Association; KNUTSON MORTGAGE CORPORATION, a Delaware corporation; HOME OWNERS FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association; and M. GENE DONLEY,

Defendants.

William P. Luther, Luther, Ballenthin & Carruthers, Minneapolis, Minnesota for plaintiff.

Charles A. Mays and Lawrence P. Schaefer, Leonard, Street and Deinard, Minneapolis, Minnesota for defendants.

Introduction

This action is before the court upon defendants Home Owners Savings Bank, F.S.B. and M. Gene Donley's motion for an extension of time to file an amended notice of appeal under authority of Federal Rule of Appellate Procedure 4 (a) (5). For the reasons set forth below, the court denies defendants' motion.

Background

The files and submissions of counsel relating to this motion reveal the following; On March 19, 1991 the court denied defendants; post-trial motions and ordered the entry of judgment in this case. Thus did the thirty-day period within which

defendants were required to file a notice of appeal commence to run; this thirty-day window of opportunity would expire on April 18, 1992. On April 5, 1991, defendants Home Owners Savings Bank, F.S.B. and M. Gene Donley filed with the clerk of the district court a notice of appeal and a document entitled "Appeal Information Form." The notice of appeal filed be defendants contained the following caption:

Peter R. Piekarski,

Plaintiff,

-vs-

Home Owners Savings Bank, F.S.B., et al.,

Defendants.

All was proceeding smoothly.

On Wednesday, April 17, the eve of the appeal deadline, defendants' counsel received a telephone call from a clerk of the United States Court of Appeals for the Eighth Circuit, Susan Thomas. Ms. Thomas informed counsel that the notice of appeal arguably contained a jurisdictional defect under authority of *United States V. Schneider*, 926 F.2d 777, 778-79 (8th Cir. 1991) ("an 'et al.' designation in a notice of appeal is ineffectual to bring before this court an defendant other than the named appellant").

Hearing this, defendants' counsel immediately prepared an amended notice of appeal and instructed his secretary

and a messenger that the amended notice was to be filed with the district court on Thursday, April 18. Defendants' counsel was in a hearing most of the eighteenth; however, during a break from the hearing, he spoke with his secretary concerning a matter unrelated to the filing of the notice of appeal. In his affidavit, counsel describes the result of this conversation;

> From this discussion my secretary formed the mistaken impression that the previously executed Amended Notice of Appeal was not to be filed that day, despite earlier instructions. I was not informed by my secretary until Friday, April 19, 1991 that the Amended Notice of Appeal [was] not filed in a timely fashion.

Affidavit of Lawrence P. Schaefer dated April 19, 1991, ¶ 5. Thus, the

amended notice of appeal was not timely filed.

Discussion

Defendants' counsel moves the court to exercise authority granted by Fed. R. App. P. 4(a)(5)[1] and extend the time within which defendants may file an amended notice. Counsel contends that his conduct amounts to "excusable neglect" within the meaning of Rule

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[1]Fed. R. App. P. 4(a)(5) provides:

The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a) * * * No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

4(a)(5). The court must disagree.[2]

At the outset, the court notes that this motion was originally filed *Ex Parte*. Defendants have since properly noticed plaintiff and his attorney; thus, the court has jurisdiction to entertain the motion. *Hable v. Pairolero*, 915 F.2d 394, 395 (8th Cir. 1990). Our Eighth Circuit Court of Appeals defines excusable neglect for purposes of Fed. R. App. P. 4(a)(5) in no uncertain terms:

> In general, excusable neglect may be found where a party has failed to learn of an entry of judgment,

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[2]In passing upon defendants' motion, it is unnecessary for the court to decide whether defendant Donley has filed a timely notice of appeal. This is a question properly addressed, in the first instance, by the court of appeals.

> or in extraordinary cases where injustice would otherwise result. The burden of demonstrating excusability lies with the party seeking the extension and *excusability will not be found when the failure to timely file an appeal is caused by* palpable oversight, *administrative or clerical errors by the attorney or the attorney's staff*, [or] an attorney's busy schedule.

Ogelsand v. Patterson Dental Company, 904 F.2d 427, 431 (8th Cir. 1990) (emphasis supplied).

Here, defendants' counsel's affidavit does not offer facts sufficient to show excusable neglect. Counsel explains the failure to file a timely notice of appeal solely as the result of miscommunication between himself and his clerical staff. This appears precisely to be the "clerical error" contemplated by *Ogelsang* and it

does not amount to excusable neglect within the meaning of Rule 4(a)(5).

Conclusion

Based upon the files, briefs, and arguments of counsel,

IT IS ORDERED that:

Defendants' motion to extend the time for filing an amended notice of appeal is DENIED.

Dated: April ___, 1991

/s/ Edward J. Devitt

EDWARD J. DEVITT
United States District Court

Supreme Court, U.S.
FILED
SEP 8 1992
OFFICE OF THE CLERK

No. 92-244

In the Supreme Court of the United States

OCTOBER TERM, 1992

PETER R. PIEKARSKI, PETITIONER

v.

HOME OWNERS SAVING BANK, F.S.B., AND M. GENE DONLEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the district court correctly allow the Resolution Trust Corporation to remove this case from state court under 12 U.S.C. 1441a(*l*)(3) (Supp. II 1990), which grants the Resolution Trust Corporation the right to remove any action to which it is a party.

2. Can a collateral document filed simultaneously with a notice of appeal serve as the functional equivalent of a notice of appeal pursuant to Federal Rule of Appellate Procedure 3(c).

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-244

PETER R. PIEKARSKI, PETITIONER

v.

HOME OWNERS SAVING BANK, F.S.B., AND M. GENE DONLEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A71) is reported at 956 F.2d 1484. The opinions of the district court on the merits (Pet. App. A72-A104, A105-A145, A146-A261) are reported at 759 F. Supp. 542, 755 F. Supp. 859, and 752 F. Supp. 1451, respectively. The prior opinion of the United States District Court for the District of Minnesota declining to remand the case to state court (App., *infra*, 1a-3a) is unreported. The opinion of the United States District Court for the District of Columbia accepting

removal and transferring the case to the United States District Court for the District of Minnesota (Pet. App. A262-A294) is reported at 743 F. Supp. 38. The opinion of the state trial court on the liability issues appears as an appendix to one of the district court's opinions (Pet. App. A186-A261), but is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1992. A petition for rehearing was denied on April 8, 1992. Pet. App. A315. The petition for a writ of certiorari was filed on July 6, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, formerly an officer of the Home Owners Savings Bank in Fergus Falls, Minnesota (Fergus Savings), filed this suit in November 1988 in a state court in Hennepin County, Minnesota, alleging that he was wrongfully terminated from his position. Petitioner named as defendants not only Fergus Savings, but also a parent company, Home Owners Savings Bank of Boston (Home Owners), respondent Knutson Mortgage (another subsidiary of Home Owners), and respondent M. Gene Donley, the president of Fergus Savings. In December 1989 a bench trial was held on liability issues. The state trial judge held all of the defendants liable and issued a judgment in favor of petitioner in February 1990. Pet. App. A269-A271.

2. In April 1990, before the state court conducted the damages phase of the trial, the Office of Thrift Supervision declared Home Owners insolvent and appointed the Resolution Trust Corporation (RTC) as conservator. Accordingly, RTC became a party to the

case. On May 7, 1990, RTC removed the case to the United States District Court for the District of Minnesota, relying on 28 U.S.C. 1441(a) and 12 U.S.C. 1819(b)(2)(B) (Supp. II 1990).[1] The Minnesota district court held that it did not have jurisdiction over the case, concluding that 12 U.S.C. 1441a(*l*) (Supp. II 1990) governs all removals by RTC, and that Section 1441a(*l*)(3) permits removal only to the United States District Court for the District of Columbia in cases that are not brought by RTC and do not involve the actions of RTC after appointment as a conservator or receiver. Accordingly, the court remanded the case to the state trial court. See Pet. App. A271-A274.

3. On June 15, 1990, RTC removed the case from the state court to the United States District Court for the District of Columbia, relying on 12 U.S.C. 1441a(*l*) (Supp. II 1990). Pet. App. A274-A275. That provision provides that "any civil action * * * to which the [RTC] is a party shall be deemed to arise under the laws of the United States," Section 1441a(*l*)(1), and that RTC "may * * * remove any such action, suit, or proceeding from a State court to the United States District Court for the District of Columbia," Section 1441a(*l*)(3).[2]

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[1] Section 1441(a) permits removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." 12 U.S.C. 1819(b)(2)(B) (Supp. II 1990) generally authorizes FDIC to "remove any action, suit, or proceeding from a State court to the appropriate United States district court."

[2] As the Minnesota district court noted, the provision also allows removal to "the United States district court for the district where the institution's principal business is located," but only in cases that "aris[e] out of the actions of the [RTC] with respect to an institution for which a conservator or a receiver has been appointed." 12 U.S.C. 1441a(*l*)(3) (Supp. II 1990) The provision subsequently has been amended to remove

Petitioner challenged the removal, but the district court concluded that it was proper. Pet. App. A262-A294. The court noted that Section 1441a(*l*)(3) broadly "gives the RTC the absolute right, subject to certain time restraints, to remove *any* case from a state court in which it is named or is substituted as a party." Pet. App. A276. Accordingly, because RTC was a party and filed its removal petition to the District of Columbia court less than 90 days after the date it became a party, removal was proper. *Id.* at A276-A278.

The court rejected petitioner's claim that the holding that removal was proper unfairly allowed RTC a second opportunity to remove the case in contravention of the ruling of the Minnesota court. The court explained:

> FIRREA does not prohibit a party from correcting [a] defective removal * * * . RTC merely cured its original mistake of removing this action to the United States District Court for the District of Minnesota by removing this case to this Court[.] Judge Devitt did not hold that *any* removal was improper—instead, he held merely that removal was improper to the federal court in Minnesota. Thus, there is no law of the case which served to bar this removal.

Pet. App. A280-A281. The court also rejected petitioner's argument that it should remand the case

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this distinction, and thus now allows removal, at the option of RTC, to the federal district court in the District of Columbia, the district that includes the place where the suit is pending, or the district where the principal place of business of the failed institution is located. See Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991, Pub. L. No. 102-233, § 316, 105 Stat. 1772.

based on "principles of abstention and judicial economy," noting that this Court had rejected a similar argument in *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 343-345 (1976). Pet. App. A281-A282. Finally, the court granted petitioner's motion to transfer the case back to the Minnesota federal court pursuant to 28 U.S.C. 1404(a). Pet. App. A283-A294.

4. Petitioner promptly filed a motion asking the Minnesota federal court again to remand the case to the state courts. The district court rejected this motion, explaining that it was "without authority to grant the remand motion," because the case was properly filed in the District of Columbia district court and properly had been transferred to the Minnesota district court. App., *infra*, 2a. On the merits, the court found Home Owners and Donley liable to petitioner for $120,000 in past damages and $35,000 in lost future earnings, found Donley liable for $25,000 in punitive damages, and awarded petitioner about $163,000 in attorney fees and costs. Pet. App. A72-A104, A105-A145, A146-A261; see *id.* at A22-A23.

5. Home Owners and Donley filed a notice of appeal within the 30-day period required by Federal Rule of Appellate Procedure 4. The face of the notice, however, listed the appellants as "Home Owners Savings Bank F.S.B., et al.," and thus did not explicitly state that Donley was appealing. Pet. App. A301-A302. The Appeal Information Form attached to the notice, however, explicitly listed Donley as an appellant. *Id.* at A303.

The court of appeals reversed. Pet. App. A1-A71. First, it rejected petitioner's argument that the failure to list Donley as an appellant on the notice of appeal precluded Donley from participating in the

appeal. *Id.* at A13 n.1. The court explained that the Information Form "unambiguously listed Donley as a party appealing the final judgment" and thus "serves as the 'functional equivalent' of a notice of appeal." *Ibid.* On the merits, it reversed all of the findings of liability, "primarily on sufficiency of the evidence." *Id.* at A14. Because none of the parties challenged the propriety of the removal, the court of appeals did not address the district court's jurisdiction.

ARGUMENT

1. The bulk of the petition (Pet. 17-54) argues that removal was improper either because it violated a common-law rule against successive removal petitions (Pet. 17-36) or because it deprived petitioner of due process (Pet. 36-54). In the court of appeals, however, petitioner did not contest the jurisdiction of the district court (apparently because the district court had ruled in his favor). Accordingly, these arguments—neither raised before nor addressed by the court of appeals—are not properly before the Court. *E.g.*, *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 603 (1991). Moreover, as we explained at note 2, *supra*, Congress has amended Section 1441a(*l*)(3) to remove the potential for confusion that resulted in the inconveniences of which petitioner complains. In any event, petitioner offers no substantial reason to believe that either claim would merit review in this Court.

a. The propriety of the removal is evident from the provisions of 12 U.S.C. 1441a(*l*) (Supp. II 1990). First, subsection (1) provides: "Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the Corporation is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original

jurisdiction over such action, suit, or proceeding."[3] Second, subsection (3) provides that "[t]he Corporation may * * * remove any such action, suit, or proceeding from a State court to the United States District Court for the District of Columbia." The only qualification is that the removal "shall be instituted * * * not later than 90 days after the date the Corporation is substituted as a party." Because RTC is a party to this case, and because the removal petition was filed on June 15, 1990 (less than 90 days after the April appointment of RTC as conservator for Home Savings), the federal district court in the District of Columbia necessarily had jurisdiction over RTC's petition for removal.

Petitioner's reliance on common-law principles to override the plain language of Section 1441a(*l*) is misplaced. First, petitioner must acknowledge that no court has accepted petitioner's claim that a common-law prohibition on successive removal petitions overcomes the language of Section 1441a(*l*). Cf. *Kirkbride* v. *Continental Casualty Company*, 933 F.2d 729, 732 (9th Cir. 1991) (relying on the language of a statute authorizing removal by the Federal Deposit Insurance Corporation to permit a successive removal petition by that entity). Moreover, the only court of appeals decision on which he relies to support his argument that a successive petition is permissible only if the ground for removal arose after the first petition, *Federal Deposit Insurance Corporation* v. *Santiago Plaza*, 598 F.2d 634 (1st Cir. 1979), did not rely on a common-law doctrine to defeat removal. Rather, it held that the removal in that case could

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[3] Section 1441a(a)(2) provides that all references to the "Corporation" in Section 1441a refer to the Resolution Trust Corporation.

not be justified under the provision in 28 U.S.C. 1446(b) that expressly allows certain types of second removal petitions. Because RTC relied on 12 U.S.C. 1441a(*l*) (Supp. II 1990) to support removal, the question whether it also could have removed the case under 28 U.S.C. 1446(b) is irrelevant.

b. Nor is there any merit to petitioner's claim (Pet. 36-54) that the application of federal law to provide for removal of this case to federal court has deprived petitioner of due process. As this Court has explained, "[n]o one has a vested right in any given mode of procedure * * * and so long as a substantial and efficient remedy remains or is provided due process of law is not denied by a legislative change." *Crane* v. *Hahlo*, 258 U.S. 142, 147 (1922). The statute plainly affords petitioner a "substantial and efficient remedy"; it affords him substantially the same remedy he had under state law, simply requiring him to pursue that remedy in federal court. Petitioner's real complaint is that although he won at a trial in state court, a federal appellate court has determined that he presented inadequate evidence to support the judgment in his favor. But he does not challenge the court of appeals' rulings on that point in this Court, and cannot credibly claim that a litigant is deprived of due process by procedures that permit appellate review of trial courts' factual findings.

Petitioner acknowledges that "[t]he only case to address the issue has rejected the due process challenge." Pet. 46 (citing *Sunbelt Savings, FSB* v. *Bent Trail Phase IV Joint Venture*, 907 F.2d 1569, 1571 (5th Cir. 1990)). Accordingly, his contention that the procedures afforded to him deprived him of due process would not merit further review even if it had been presented to the court of appeals.

2. Finally, petitioner challenges (Pet. 54-63) the court of appeals' conclusion that the Appeal Information Form attached to respondents' notice of appeal should serve as the "functional equivalent" of a notice of appeal, arguing that there is a conflict in the circuits on this question. Petitioner fails to acknowledge, however, that this Court resolved the conflict last Term in *Smith* v. *Barry*, 112 S. Ct. 678 (1992). In that case, the Court explained: "If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal." *Id.* at 682. Because the Appeal Information Form was filed within the time specified by Rule 4, and contained the information specified by Rule 3, the court of appeals correctly held that the document served as a notice of appeal for respondent Donley.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

RICHARD T. ABOUSSIE
Acting General Counsel

MARK P. HILEMAN
Acting Senior Counsel

JEFFREY EHRLICH
Counsel
Resolution Trust Corporation

SEPTEMBER 1992

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civ. 4-90-661

PETER R. PIEKARSKI,
PLAINTIFF

v.

HOME OWNERS SAVINGS BANK, F.S.B., f/k/a WESTERN MINNESOTA FEDERAL SAVINGS AND LOAN ASSOCIATION, f/k/a WESTERN MINNESOTA SAVINGS AND LOAN ASSOCIATION, f/k/a FERGUS FALLS SAVINGS AND LOAN ASSOCIATION; KNUTSON MORTGAGE CORPORATION, A DELAWARE CORPORATION; HOME OWNERS FEDERAL SAVINGS AND LOAN ASSOCIATION, A FEDERALLY CHARTERED SAVINGS AND LOAN ASSOCIATION; AND M. GENE DONLEY,
DEFENDANTS

[Filed Oct. 15, 1990]

ORDER DENYING REMAND

This wrongful termination from employment action has been transferred to this District from the District of Columbia under 28 U.S.C. 1404(a).

Plantiff moves for remand to the Minnesota District Court where it was first filed. *

The court is without authority to grant the remand motion. The case was properly in the United States District Court for the District of Columbia under FIRREA, 12 U.S.C. 1441a(l)(1)(3) and was later permissibly transferred to the United States District Court for the District of Minnesota under 28 U.S.C. 1404(a) for the convenience of parties and witnesses since the case is obviously a typical one for trial in this vicinage. All parties and witnesses are in Minnesota, the alleged wrongful discharge took place here and the case has been partially tried in this district.

Although there are logical arguments for the trial to be completed before Judge Harlan Nelson in the state court, the entry into the case by Resolution Trust Corporation on June 15, 1990 as conservator of several defendants, and that corporation's statutory right of removal to the federal court, forecloses remand to the state court.

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* The issue was partially tried in the Minnesota State District Court, later removed to the United States District Court for the District of Minnesota, then remanded to the Otter Tail County State District Court and then removed to the United States District Court for the District of Columbia and then transferred, under 28 U.S.C. § 1404(a) (for the convenience of parties and witnesses and in the interests of justice), to the District of Minnesota for trial on the sole remaining issue of damages.

Plaintiff's motion for remand to the state court is DENIED.

Dated: October 15, 1990.

/s/ Edward J. Devitt
EDWARD J. DEVITT
United States District Court

Supreme Court, U.S.
FILED
SEP 4 1992
OFFICE OF THE CLERK

No. 92-244

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

Peter R. Piekarski,

Petitioner,

vs.

Home Owners Savings Bank, F.S.B.,
and M. Gene Donley,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT M. GENE DONLEY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 92-244

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RESPONDENT M. GENE DONLEY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. OPINIONS BELOW

The opinions below are adequately set forth in the Petition for Writ of Certiorari ("Petition") and are appended to the Petitioner's Appendix.

II. JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

III. QUESTIONS PRESENTED

1. May a litigant raise in his Petition for a Writ of Certiorari an issue that was never appealed below and not considered by the Eighth Circuit Court of Appeals?

2. If the answer to Question 1 is in the affirmative, does the removal of this case present grounds for granting certiorari under Rule 10.1(a) of the Rules of the Supreme Court of the United States?

3. Should this Court grant review to reconsider its decision in William Louis Smith v. Wayne S. Barry, ___ U.S. ___, 112 S.Ct. 678, 116 L.Ed. 2d 678 (1992), in which the Court resolved a conflict in the circuits and held that a "collateral document" filed within the time for appeal can serve as a "functional equivalent" of a notice of appeal satisfying Federal Rule of Civil Procedure 3(c)?

The Office of the United States Solicitor General is preparing the Brief in Opposition to Writ of Certiorari on behalf of the Resolution Trust Corporation, receiver for Respondent Home Owners Savings Bank, F.S.B., on the first two issues set forth above. In this Brief in Opposition, Respondent M. Gene Donley will address the third issue set forth above and adopts the position taken by the Solicitor General as to the remaining issues.

IV. STATUTES INVOLVED

The statute involved in this matter is 12 U.S.C. § 1441a(l), prior to its amendment in 1992.

V. STATEMENT OF THE CASE

The trial court entered final judgment in this matter on March 19, 1991, awarding damages to Petitioner against Respondents M. Gene Donley ("Donley") and Home Owners Savings Bank, F.S.B. ("Home Owners") based upon four causes of action arising from Petitioner's January 1988 termination from his position of Vice President in Charge of Mortgage Lending at Home Owners-Fergus Falls. Two other defendants, Home Owners Federal Savings and Loan Association ("Home Owners-Boston") and Knutson Mortgage Corporation ("Knutson") were dismissed from the action prior to entry of final judgment.

On April 5, 1991, Respondents Donley and Home Owners filed a timely Notice of Appeal from this final judgment. The caption in the Notice of Appeal indicated M. Gene Donley, et al., as Appellants, and the text indicated that Appellants (in the plural) were appealing the trial court's judgment to the Eighth Circuit Court of Appeals. The Notice of Appeal was served and filed with an attachment, a document entitled "Appellants' Information Form A," which expressly listed both Donley and Home Owners as Appellants. Respondents Donley and Home Owners thereafter also filed an amended Notice of Appeal on May 2, 1991, based upon the provision of Rule 4(a)(1) which allows any party 60 days after the entry of judgment to file a Notice of Appeal where an agency of the United States is a party.

VI. ARGUMENT

A. The Exercise of Appellate Jurisdiction Over Defendant Donley does not Conflict with any Established Precedent

The Petitioner's challenge to the exercise of appellate jurisdiction over Donley is expressly contrary to this Court's recent decision in William Louis Smith v. Wayne S. Barry, ___ U.S. ___, 112 S.Ct. 678, 116 L.Ed.2d 678 (1992). In Barry this Court held that a document which is provided to the court and served on opposing counsel within the time period for review can serve as the "functional equivalent" of a notice of appeal and satisfy the specificity of the requirement of Rule 3(c) when the actual notice of appeal is defective under this Rule. Despite the fact that the Barry decision was presented to the panel of the Eighth Circuit considering this case after this issue had been argued, Respondent's Appendix at A1-A2, and was also circulated to the Petitioner's attorney, id., he fails to mention it at any time in his Petition. Petitioner either intentionally omits reference to this controlling authority or overlooks its direct application in arguing that there is somehow an unresolved dispute between the circuits regarding whether a document filed before the time limit for an appeal can constitute a "functional equivalent" of a notice of appeal and satisfy the specificity requirement of Federal Rule 3(c). In any event, that issue has already been resolved by this Court contrary to Petitioner's position.

B. The Original Notice of Appeal Satisfies the Specificity Requirement of Appellate Rule 3(c)

Even under established precedent before Barry, the original Notice of Appeal filed by Respondents satisfied the specificity requirement of Appellate Rule 3(c), and this Court should deny the Petition on this ground as well.

The original Notice of Appeal and the attached Appellant's Information Form A provide unambiguous notice that both Donley and Home Owners were appealing the final judgment in this matter. The requirements of Appellate Rule 3(c) were therefore fully satisfied by that Notice. Rule 3(c) in pertinent part provides:

> The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. . . . An appeal shall not be dismissed for informality of form or title of the notice of appeal.

Fed. R. App. Pro. 3(c) (emphasis added). The purpose of the specificity requirement in this rule "is to provide notice to both the opposition and the court of the identity of the appellant or appellants. . . [and] the specificity requirement of Rule 3(c) is met only by some designation that gives fair notice of the specific individuals or entity seeking appeal." Torres v. Oakland Scavenger Co., 487 U.S. 312, 318 (1988).

In discussing what constitutes fair notice the Court in Torres said that, "if a litigant files papers in a fashion that is technically at variance with the letter of the procedural rule a court may nevertheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires." 487 U.S. at 316-17. This standard is clearly met in this matter, both on the face of the original Notice of Appeal and when also considering Appellant's Information Form A which was attached to the Notice of Appeal and served upon the plaintiff in the time period permitted for appeal.

The original Notice of Appeal specified "Home Owners Savings Bank, F.S.B., et al.," as defendants in the caption, but in the text read "defendants [in the plural] hereby appeal . . . from the final judgment entered in this action on the 19th day of March, 1991." Attached to the original notice was Appellant's Information Form A, which clearly identified both Donley and Home Owners as appellants. Appellant's Information Form A was served upon appellee on April 5, 1991, well within the minimal appeal time mandated by Appellate Rule 4(a)(1). Respondent's Appendix at A3-A4, A6, Schaefer Affidavit, ¶ 2, Exhibit A.

By claiming that the original notice and information form do not overcome the "jurisdictional hurdle" of Appellate Rule 3(c), Petitioner misreads both the authority interpreting this rule and its underlying purpose. The leading case in this area before Barry, Torres, supra, applied Rule 3(c) to dismiss an appeal by a party referred to in the caption of the Notice of Appeal as "et al." under far different circumstances than are present here. Torres, the unsuccessful appellant, was an intervenor in that case

and was not named in the Complaint, unlike Respondent Donley in this matter, who has been a named defendant throughout this lawsuit.

Furthermore, the documents filed in this matter are plainly distinguishable from those at issue in Torres and its progeny and this distinction requires a different result. The original Notice of Appeal on its face affords no plausible interpretation except that Donley and Home Owners-Fergus Falls are appellants. These were the only two defendants who were not dismissed by the district court's March 19, 1991 final judgment, and therefore the only plausible interpretation of the Notice of Appeal is that Respondents Donley and Home Owners were appealing the judgment identified therein. The use of "et al" in the caption and the plural "defendants" in the text of the notice could only have referred to both defendants. See Griffith v. Johnson, 899 F.2d 1427, 1429-30 (5th Cir. 1990) ("et al" satisfies the specificity requirement of Rule 3(c) when there can only be one other appellant).

If the Notice of Appeal left any ambiguity as to the identity of the appellants, this ambiguity was eliminated by Appellant's Information Form A attached thereto, which expressly identified both Donley and Home Owners as appellants. When a document satisfies the specificity requirement of Rule 3(c) and is filed within the time period for appeal, it must be treated as the functional equivalent of the Notice of Appeal and cure any defects therein. Barry, supra; Good Samaritan Hospital v. Sullivan, 952 F.2d 1017 (8th Cir. 1991); Griffith, supra; see also Brotherhood of Railroad Carpenters v. Atchison, Topeka and Santa Fe Railroad Co., 894 F.2d 1463, 1465 (5th Cir. 1990) (ambiguity arising from "et al" designation in Notice of

Appeal cured when remaining five appellants were all listed in a memorandum in support of motion for injunction pending appeal filed and served within the time period permitted for appeal); Dura Systems, Inc. v. Rothberg Investments, Ltd., 886 F.2d 551, 554-55 (3d Cir. 1989) cert. den. 110 S.Ct. 884 (1990) (Consent Order filed within time for appeal which secured the judgment in name of parties not enumerated in Notice of Appeal serves as "functional equivalent" of notice of appeal for these parties); cf. United States v. Schneider, 926 F.2d 777, 778-79 (8th Cir. 1991) (documents specifying previously unnamed appellants do not cure "et al" defect in Notice of Appeal because these documents were filed after the time permitted to appeal). Furthermore Donley, like the appellants permitted to proceed in Dura Systems, filed an appeal bond in this matter in accordance with the district court's order within the 30 day time limits of Appellate Rule 4(a)(1). Respondent's Appendix at A5, A10-A16, Schaefer Affidavit, ¶ 7, Exhibit E.

Under the circumstances of this case, where there were only two possible appellants, where the Notice of Appeal not only contained the "et al" designation but was also cast in the plural, and where the information form filed with the Notice of Appeal within thirty days from the entry of judgment expressly identified both appellants by name, the original Notice of Appeal met the specificity requirement of Appellate Rule 3(c).

C. The Amended Notice of Appeal was Timely Filed Pursuant to Rule 4(a)(1)

Even if the original Notice of Appeal did not satisfy the specificity requirement of Appellate Rule 3(c), there still is no basis for review as Respondents

cured any possible defect with the original Notice of Appeal by filing the timely Amended Notice of Appeal on May 2, 1991.

Appellate Rule 4(a)(1) states that "if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after [the date of the entry of judgment or order appealed from]" (emphasis added). The Resolution Trust Corporation ("RTC") has been extensively involved in this case as a defendant since it removed this matter to federal district court on May 17, 1990. The RTC is an agency of the United States government[1] and is a party to this case by virtue of its status as receiver over Home Owners-Boston, its ownership of Home Owners-Fergus Falls, and its removal of this action to federal court. See 12 U.S.C. § 1441a(b)(4) and 12 U.S.C. § 1821d(2)(A)(i) (providing that RTC, upon appointment as conservator "by operation of law succeed[ed] to . . . all rights, titles, powers and privileges of [Home Owners-Boston]"); see also NSPA Services Corp. v. Independent American Savings Association, 868 F.2d 1415 (5th Cir. 1989) (FSLIC as receiver over defendant is a party as a matter of law); Farina v. Mission Investment Trust, 615 F.2d 1068, 1074-1075, n.19 (5th Cir. 1984) (FDIC becomes a party to lawsuit when filing notice of removal). The RTC's continued involvement in this lawsuit is conclusively established by the district court's decision not to require defendant Home Owners to post a supersedeas bond in

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[1]Financial Institution Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), § 501(b)(1)(B), codified at 12 U.S.C. § 1441a(b)(1)(B).

connection with this appeal based upon the RTC's status under FIRREA. See Judge Devitt's April 25, 1991 Order.

The Eighth Circuit Court of Appeals' decision in Rochester Methodist Hospital v. Travelers Ins. Co., 728 F.2d 1006 (8th Cir. 1984) establishes that RTC's involvement in this lawsuit triggers the application of the 60-day period in Rule 4(a)(1). In Rochester Methodist, the Department of Health and Human Services ("HHS"), an agency of the United States, was a party to the proceeding below until the plaintiff's claim against it was transferred to the United States Claim Court. 728 F.2d at 1010. HHS's motion to intervene in the proceeding prior to trial was denied and HHS was not a party to the proceeding at the time judgment was entered. Nonetheless, the court declared that HHS's continued interest in the litigation and its involvement below required the 60-day provision of Rule 4(a)(1) to apply. 728 F.2d at 1012. The court reasoned that the purpose of the 60-day period was to provide the government additional time to consider amongst its several departments whether to pursue an appeal and that this purpose must be interpreted broadly to apply "when the government has a substantial interest in the case." 728 F.2d at 1011. The court concluded that the "participation and interest" of HHS in the case made it a party for purposes of Rule 4(a).

The same analysis makes the RTC a Rule 4(a) party in this matter. The RTC was clearly a party below, and at its direction considerable expenses were incurred in removing this matter to federal court and litigating the issue of federal jurisdiction. Since the removal, the RTC has supervised this litigation closely and participated in all major decisions involved in the

litigation. Respondent's Appendix at A5, Schaefer Affidavit, ¶ 6. The only remaining institutional respondent in this lawsuit, Home Owners, is an asset of the RTC; the RTC clearly has the requisite interest in the outcome of this appeal. Moreover, the government approval process that is the driving force behind the extended appeal time in Rule 4(a)(1), applies directly to this case. Respondent's Appendix at A5, Schaefer Affidavit, ¶ 6.

The May 2, 1991 amended Notice of Appeal expressly naming both Home Owners and Donley as appellants was timely and renders moot any possible defect in the original Notice of Appeal.

VII. CONCLUSION

None of the considerations governing review of Certiorari enumerated in paragraph 1(a) of Rule 10 are present in this case. The Petition is wholly without merit and should be denied.

Respectfully submitted,

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Lawrence P. Schaefer
Leonard, Street and Deinard
150 South Fifth Street
Minneapolis, MN 55402
(612) 335-1500

Counsel for Respondent M. Gene Donley

No. 92-244

In The

Supreme Court of the United States

October Term, 1992

PETER R. PIEKARSKI,

Petitioner,

vs.

HOME OWNERS SAVINGS BANK, F.S.B., AND M. GENE DONLEY,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

RESPONDENT M. GENE DONLEY'S APPENDIX

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Letter Transmitting Barry Decision A1

5/9/91 Schaefer Affidavit A2-A16

LAW OFFICES
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[Attorneys' names deleted in printing]

January 29, 1992

WRITER'S DIRECT DIAL NUMBER
(612) 335-1664

Clerk of Court
Eighth Circuit Court of Appeals
525 Federal Building
316 North Robert Street
St. Paul, MN 55101

Re: Recent United States Supreme Court Decision Affecting Notice of Appeal Issue in *Piekarski v. Home Owners Savings Bank, et al.* Court File No. 91-2132MNMI

Dear Sir/Madam:

Enclosed for circulation to Judge Friedman's, Judge John Gibson's and Judge Magill's chambers are three copies of a recent United States Supreme Court decision. Since the above-referenced case was briefed and argued, the Supreme Court has issued a decision in *William Lewis Smith v. Wayne S. Barry*, No. 90-7477, 60 U.S.L.W. 4065, ___ U.S. ___ (1/14/92), which is relevant to the notice of appeal issue affecting appellant M. Gene Donley. In *Barry* the Court held that a document which provides "notice to other parties and the court" regarding the appeal and is

filed within the time permitted to appeal under Rule 4 of the Federal Rules of Appellate Procedure can serve as the "functional equivalent" of a notice of appeal and satisfy the specificity requirement of Rule 3(c). The Appellant's Information Form A filed and served by appellant Donley with the initial Notice of Appeal in this matter contained the information required under Rule 3(c) and thus serves as the functional equivalent of the Notice of Appeal and cures any defect allegedly caused by the "et al." designation in the caption.

Very truly yours,

LEONARD, STREET AND DEINARD

By /s/ Lawrence P. Schaefer
Lawrence P. Schaefer

Enc.
cc: William Luther, Esq. (w/enc.)
M. Gene Donley (w/o enc.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Peter R. Piekarski, Appellee, -vs- Home Owners Savings Bank, F.S.B., and M. Gene Donley Appellants.	Civil Action No. 4-90-661 AFFIDAVIT OF LAWRENCE P. SCHAEFER

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

COMES NOW AFFIANT LAWRENCE P. SCHAEFER, being first duly sworn upon oath, deposes and states as follows:

1. I am an associate in the law firm of Leonard, Street and Deinard, Suite 2300, 150 South Fifth Street, Minneapolis, Minnesota 55402, counsel for appellants in the above-captioned matter.

2. On Tuesday, April 16, 1991, appellants' counsel was advised by the Clerk's Office for the Eighth Circuit Court that, pursuant to the authority of *United States v. Schneider*, 926 F.2d 777 (8th Cir. 1991), there might be a jurisdictional defect in the original Notice of Appeal filed in this case which had been captioned "Home Owners

Savings Bank, F.S.B., et al." as Defendants. The Appellant Information Form A filed therewith, however, clearly indicated that the appellants in this matter are Home Owners Savings Bank, F.S.B., *and* M. Gene Donley. This form was served upon appellee on April 5, 1991. A copy of the affidavit of service is attached hereto as Exhibit A.

3. To ensure that no confusion would arise regarding appellate jurisdiction over defendant Donley, on Wednesday, April 17, 1991, I prepared an Amended Notice of Appeal, to be filed that day or on Thursday, April 18, 1991, the last day that a timely Notice of Appeal could be filed pursuant to the thirty-day requirement of Appellate Rule 4(a)(1).

4. Attached as Exhibits B, C and D are copies of the Amended Notice of Appeal, the transmission letter enclosing same and the internal Leonard, Street and Deinard messenger request form directing that these documents be filed on Thursday, April 18, 1991.

5. I was in a hearing all day Thursday, April 18, 1991, which concluded at noon on Friday, April 19, 1991. A facsimile transmission from defendant/appellant M. Gene Donley that was unrelated to the above described documents arrived that morning, and during a break from the hearing I briefly discussed this document with my secretary. From this discussion my secretary formed the mistaken impression that the previously executed Amended Notice of Appeal was not to be filed that day, despite earlier instructions. I was not informed by my secretary until Friday, April 19, 1991 that the Amended Notice of Appeal was not filed pursuant to my earlier instructions.

6. Since the Resolution Trust Corporation placed Home Owners Federal Savings and Loan Association ("Home Owners-Boston") under conservatorship in April, 1990 and receivership in September, 1990, I have been required to gain approval for all decisions regarding this matter from the Resolution Trust Corporation attorney who is assigned to the Home Owners-Boston Receivership.

7. On April 5, 1991 defendant/appellant M. Gene Donley filed with the district court a supersedeas bond securing this judgment through appeal. A copy of said bond and accompanying transmission papers demonstrating that it was served upon appellee within the time period permitted for appeal are attached hereto as Exhibit E.

FURTHER AFFIANT SAYETH NOT.

/s/ Lawrence P. Schaefer
Lawrence P. Schaefer

Subscribed and sworn to before
me this 9th day of May, 1991.

/s/ Clarice M. Davis
Notary Public

(Seal) CLARICE M. DAVIS
NOTARY PUBLIC-MINNESOTA
ANOKA COUNTY
My Commission Expires Oct. 12, 1996

EXHIBIT A

AFFIDAVIT OF SERVICE BY MAIL

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

JULIE M. BALOT, of the City of Minneapolis, County of Hennepin, State of Minnesota, being first duly sworn upon oath, states that on the 5th day of April, 1991, on behalf of appellants she served APPELLANT'S FORM A upon appellee Peter R. Piekarski, through his counsel, by causing to be mailed true and correct copies thereof, enclosed in an envelope, postage prepaid, and by depositing same in the post office at Minneapolis, Minnesota, directed to the last known address of the persons listed below:

William P. Luther, Esq.
Luther, Ballenthin & Carruthers
4624 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402.

/s/ Julie M. Balot
Julie M. Balot

Subscribed and sworn to before me
this 5th day of April, 1991.

/s/ Clarice M. Davis
Notary Public

(Seal) CLARICE M. DAVIS
NOTARY PUBLIC-MINNESOTA
ANOKA COUNTY
My Commission Expires Oct. 12, 1996

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
FOURTH DIVISION

Peter R. Piekarski, Plaintiff, -vs- Home Owners Savings Bank and M. Gene Donley, Defendants.	Civil Action No. 4-90-661 AMENDED NOTICE OF APPEAL

Notice is hereby given that above named defendants hereby appeal to the United States Court of Appeals for the Eighth Circuit from the final judgment entered in this action on the 19th day of March, 1991.

Dated: April 17, 1991.

Respectfully submitted,

/s/ Lawrence P. Schaefer
Charles A. Mays (#69218)
Lawrence P. Schaefer (#195583)
LEONARD, STREET AND DEINARD
Suite 2300
150 South Fifth Street
Minneapolis, Minnesota 55402
Telephone: (612) 335-1500

ATTORNEYS FOR DEFENDANTS

EXHIBIT C

LAW OFFICES
LEONARD, STREET AND DEINARD
PROFESSIONAL ASSOCIATION

SUITE 2300
150 SOUTH FIFTH STREET
MINNEAPOLIS, MINNESOTA 55402
TELEPHONE (612) 335-1500
FACSIMILE (612) 335-1657

[Attorneys' names deleted in printing]

April 18, 1991

WRITER'S DIRECT DIAL NUMBER
335-1664

BY MESSENGER

Clerk of the U.S. District Court
United States District Court
District of Minnesota
110 South Fourth Street
514 U.S. Courthouse
Minneapolis, Minnesota 55401

Re: ***Peter R. Piekarski v. Home Owners Savings Bank, F.S.B., et al.*** **Civil Action No. 4-90-661**

Dear Clerk:

Enclosed herewith for filing is the original and two copies of an Amended Notice of Appeal.

Very truly yours,

LEONARD, STREET AND
DEINARD

By /s/ Lawrence P. Schaefer
Lawrence P. Schaefer

LPS/jmb
Enclosures

EXHIBIT D

ERRAND REQUEST

Requested by: Larry Schaefer Ext. 164

Date: April 18, 1991 **Time:** 9:00 a.m.

Delivery: X **Pick-up:** **DEADLINE (time):**

Service: **Filing:** X

Approved for Outside Delivery? **Yes:** X **No:**

Immediate Notification of Delivery? **Yes:** **No:**

Name: Clerk of the United States District Court

Company Name: United States Courthouse

Address: 110 South Fourth Street
514 U.S. Courthouse
Minneapolis, Minnesota

Telephone:

Special Instructions: Please deliver envelope to clerk's office for filing. Thank you.

Client Name: Home Owners Savings Bank

Client Number: 8412-12166

Completed by: **Time:**

Comments:

EXHIBIT E

720 34 66

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
FOURTH DIVISION

Peter R. Piekarski, Plaintiff, -vs- Home Owners Savings Bank, F.S.B., et al., Defendants.	Civil Action No. 4-90-661 **SUPERSEDEAS BOND**

STATE OF MINNESOTA)
) ss.
COUNTY OF OTTER TAIL)

KNOW ALL BY THESE PRESENTS, that we M. Gene Donley, principal, and Tri-State Insurance Company of Minnesota, Surety, are held and firmly bound unto Peter R. Piekarski in the above-entitled action in the sum of twenty-five thousand dollars and no/100 ($25,000.00), to be paid to plaintiff Peter R. Piekarski or his assigns, for which payment will and truly to be made, we bind ourselves, our heirs executors and administrators, firmly by these presents.

This obligation is conditional upon the punitive damage judgment against defendant M. Gene Donley in the

above-captioned action being stayed pending resolution of appeal.

Defendant M. Gene Donley shall pay all costs and disbursements that may be adjudged against said defendant and abide the Order of the Court in the event of any final, unappealable judgment. Then this obligation shall be void, otherwise to remain in full force and effect.

Signed, Sealed and Delivered)
in Presence of)
/s/ Illegible)
/s/ Renee M. Rocholl)

PRINCIPAL (Defendant)

/s/ M. Gene Donley
M. Gene Donley

TRI-STATE INSURANCE COMPANY
OF MINNESOTA

By /s/ Patricia J. Jacobson (Seal)
Patricia J. Jacobson
Attorney in Fact

No. 90-203

POWER OF ATTORNEY
TRI-STATE INSURANCE COMPANY OF MINNESOTA
Luverne, Minnesota

NOTICE: The warning found elsewhere in this Power of Attorney affects the validity thereof. Please review carefully.

KNOWN ALL MEN BY THESE PRESENTS, that the TRI-STATE INSURANCE COMPANY OF MINNESOTA, a corporation, does hereby make constitute, and appoint

R.E. Pribbernow, Gary D. Mickelson, Patricia J. Jacobson, Karen Richards, and J.R. Strickland of Fergus Falls, MN 56537

its true and lawful Attorney-in-Fact, to make, execute, seal and deliver for and on its behalf, as surety, and as its act and deed any and all bonds, recognizances, stipulations or undertakings excluding, however, any bonds or undertakings guaranteeing payment of loans or the interest thereon, provided however, no single obligation will exceed

Two Hundred Fifty Thousand and No/100 ($250,000.00) Dollars

This Power of Attorney is not valid or in effect unless it is attached to the bond on which the execution is authorized by the said Power of Attorney. The acknowledgement and execution of any such document by the said Attorney-in-Fact, shall be as binding upon this company as if such bond has been executed and acknowledged by the regularly elected officers of this company.

The Tri-State Insurance Company of Minnesota further certifies that this Power of Attorney is granted and is executed and sealed under and by authority of the following resolution adopted by the Board of Directors of the Tri-State Insurance Company of Minnesota at a meeting duly called and held on the 29th day of April, 1974, to wit:

"RESOLVED, that the President, Vice President, Secretary, Treasurer, Assistant Secretary or Assistant Treasurer may appoint Attorneys-in-Fact or agents or Resident Vice Presidents or Resident Assistant Secretary who shall have authority to issue bonds, policies, or undertakings in the name of the Company, subject to such rules, restrictions and regulations as such officers may prescribe."

This instrument is signed and sealed by facsimile as authorized by the following Resolution adopted by the directors of the Company on November 15, 1983:

"RESOLVED, that the signature of any officer of the Company authorized to appoint Attorneys in Fact, as provided by corporate Resolution dated April 29, 1974, certifying to the correctness of any copy of a Power of Attorney and the seal of the Company, may be affixed by facsimile to any Power of Attorney or copy thereof issued on behalf of the Company. Such signatures and seal are hereby adopted by the Company as original signatures and seal, to be valid and binding upon the Company with the same force and effect as though manually affixed".

IN WITNESSES WHEREOF, the said Tri-State Insurance Company of Minnesota, a Minnesota corporation, has caused this Instrument to be executed by its President

with its corporate seal affixed this 15th day of November, 1990.

TRI-STATE INSURANCE
COMPANY OF MINNESOTA

(Stamp)

Curtis W. Bloemendaal
(signed)
By: Curtis W. Bloemendaal,
President

WARNING: THIS POWER INVALID IF NOT PRINTED ON BLUE BACKGROUND WITH RED AND BLUE BORDER.

STATE OF MINNESOTA)
COUNTY OF ROCK) SS

On this day, before the undersigned, a Notary Public in and for said County and State, personally came the above named officer of the TRI-STATE INSURANCE COMPANY OF MINNESOTA, to me personally known to be the individual and officer who executed the preceding instrument, and he acknowledged the execution of said instrument to be the voluntary act and deed of the TRI-STATE INSURANCE COMPANY OF MINNESOTA and his voluntary act and deed as an officer of said corporation, and that the seal of said corporation was affixed to said instrument by the authority and direction of the said corporation.

Witness my hand and my Notarial Seal at Luverne, Rock County, Minnesota, the day and year last written above.

(Seal) (Stamp) JUDY MILLER
NOTARY PUBLIC-MINNESOTA
ROCK COUNTY
Commission Expires Dec. 27, 1994

Judy Miller (signed)
Notary Public

CERTIFICATE

I, the undersigned, Assistant Secretary of TRI-STATE INSURANCE COMPANY OF MINNESOTA do hereby certify that the foregoing power of attorney and the above Resolution of its Board of Directors are true and correct copies and are in full force and effect on this date.

In witness whereof, I have herunto [sic] subscribed my name as Assistant Secretary, and affixed the corporate seal of the corporation this 6th day of March 1991

Form #PA-5 (Seal)

/s/ Illegible
Assistant Secretary

AFFIDAVIT OF SERVICE BY MAIL

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

JULIE M. BALOT, of the City of Minneapolis, County of Hennepin, State of Minnesota, being first duly sworn

upon oath, states that on the 26th day of March, 1991, on behalf of defendants, she served defendant M. Gene Donley's **SUPERSEDEAS BOND** upon plaintiff Peter R. Piekarski, through his counsel, by causing to be mailed true and correct copies thereof, enclosed in an envelope, postage prepaid, and by depositing same in the post office at Minneapolis, Minnesota, directed to the last known address of the persons listed below:

William P. Luther, Esq.
Kristine Legler Kaplan, Esq.
Luther, Ballenthin & Carruthers
4624 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402.

/s/ Julie M. Balot
Julie M. Balot

Subscribed and sworn to before me
this 26th day of March, 1991.

/s/ Clarice M. Davis
Notary Public

(Seal) CLARICE M. DAVIS
NOTARY PUBLIC-MINNESOTA
ANOKA COUNTY
My Commission Expires Oct. 12, 1996

Supreme Court, U.S.
FILED
SEP 30 1992
OFFICE OF THE CLERK

No. 92-244

In The

Supreme Court of the United States

October Term, 1992

PETER R. PIEKARSKI,

Petitioner,

vs.

HOME OWNERS SAVINGS BANK, F.S.B. and M. GENE DONLEY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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80 South Eighth Street
Minneapolis, MN 55402
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Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The following issues were first raised in the briefs in opposition to the petition for certiorari. Therefore, petitioner responds to the arguments first raised in those briefs pursuant to this Court's Rule 15.6.

I. Whether Petitioner's Challenges to the Lower Court Exercise of Jurisdiction Over His State Law Claims (Questions I and II) are Properly Before This Court.

The Justice Department contends that since the arguments made in Questions I and II of the petition were not

made at the court of appeals level they "are not properly before the Court." Brief for the Federal Respondent in Opposition at 6. That argument misunderstands the underlying bases for the challenges and the authority cited for its own proposition.

The federal courts are of limited jurisdiction. *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 29 S.Ct. 458, 463 (1909); *National Surety Corp. v. Chamberlain*, 171 F.Supp. 591, 592 (N.D. Tex. 1959) (federal courts presumed to be without jurisdiction unless Federal Constitution or act of Congress pursuant to constitutional authority provides otherwise). If the federal court exercise of jurisdiction over petitioner's state law claims was unconstitutional or otherwise improvident, the federal courts were without authority to reverse petitioner's state court liability victory. *Murray, supra.* This Court has noted that the independence of the state governments requires that federal courts scrupulously confine their own jurisdiction. *Healy v. Ratta*, 292 U.S. 263, 54 S.Ct. 700, 703 (1934). Petitioner cannot confer jurisdiction on the federal courts by arguing to uphold his trial court victory at the court of appeals level.

The authority cited by the Justice Department for the preclusive effect of a failure to raise an argument at the court of appeals level, in addition to being inapplicable to jurisdictional issues, speaks predominantly to arguments not set forth in the petition and is discretionary, not preclusive. *See Demarest v. Manspeaker*, 111 S.Ct. 599, 602-03 (1991) (citing *Lytle v. Household Mfg., Inc.*, 110 S.Ct. 1331, 1336, n. 3 (1990)). "Only the questions set forth in the petition, or fairly included therein, will be considered

by the Court." This Court's Rule 14.1(a). All of the petitioner's arguments are properly set forth in his petition, and while "the benefit of a full record or lower court determination" . . . effects this "Court's discretion," *Lytle, supra,* the procedural posture of this case and the compelling arguments set forth by petitioner more than compensate for that consideration.[1]

II. Whether *Smith v. Barry,* 112 S.Ct. 678 (1992), Controls Question III of the Petition.

Question III of the petition inquires whether collateral papers *filed at the same time as an actual notice of appeal* may serve as the functional equivalent of the notice of appeal. (Emphasis added.) In *Barry,* this Court granted certiorari to decide "whether an appellate brief may serve as the notice of appeal required by Rule 3." 112 S.Ct. at 681. This Court held that "a document intended to serve as an appellate brief may qualify as the notice of appeal required by Rule 3." *Id.* at 680. In reaching that conclusion, this Court noted that the Federal Rules "envision that the notice of appeal and the appellant's brief will be *two separate filings,*" and "do not preclude an appellate court from *treating a filing styled as a brief as a notice of appeal.*" *Id.* at 682 (emphasis added). In contrast to *Barry,* the document that the court of appeals treated as individual defendant Donley's notice of appeal was accompanied by an actual notice of appeal which was defective

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[1] The Justice Department references the amendment to 12 U.S.C. §1441a(1)(3) (designed to avoid the hardship suffered by petitioner) as a mitigating factor. Brief for the Federal Respondent at 6. Instead, that fact should heighten the inquiry.

as to Donley. Therefore, the logic behind "treating" a collateral document as a notice of appeal is that it can be seen as a separate invocation of the court's jurisdiction. That rationale is simply inapplicable when an actual notice of appeal is part of the same filing. *See* Petition for Writ of Certiorari at 60-62.

CONCLUSION

Wherefore, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

WILLIAM P. LUTHER
4624 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 338-1931

Attorney for Petitioner